UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

IN RE VOLKSWAGEN TIMING CHAIN PRODUCT LIABILITY LITIGATION	Civil Action No.: 2:16-cv-02765 (JLL) (JAD) Motion Date: January 17, 2017 **ELECTRONICALLY FILED** **ORAL ARGUMENT REQUESTED**

DEFENDANT VOLKSWAGEN GROUP OF AMERICA, INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND TO COMPEL ARBITRATION

Jeffrey L. Chase, Esq.
Michael B. Gallub (pro hac vice pending)
Chase, Kurshan, Herzfeld & Rubin, LLC
354 Eisenhower Parkway
Suite 1100
Livingston, New Jersey 07039
Tel: (973) 535-8840

Attorneys for Defendant
Volkswagen Group of America, Inc.

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES vi

PRELIMINARY STATEMENT 1

ARGUMENT 5

I. LEGAL STANDARD 5

II. THOSE CLAIMS INVOLVING CONTRACTS CONTAINING AN ARBITRATION CLAUSE AND CLASS CLAIMS WAIVER MUST BE DISMISSED AND PROMPTLY REFERRED TO ARBITRATION 5

A. The Governing Legal Standard 5

B. The Applicable Arbitration Clauses 7

C. Plaintiffs' Own Pleadings Require This Court To Enforce The Arbitration Clause And Class Action Waiver 9

D. In Addition, Non-Signatory Defendants Generally Can Enforce Arbitration Clauses Under The Doctrine Of Equitable Estoppel........12

III. PLAINTIFFS' COMMON LAW CLAIMS MUST BE DISMISSED FOR FAILURE TO PLEAD THE APPLICABLE LAW 15

A. The Failure to Plead Which State's Law Applies Mandates the Dismissal of Plaintiffs' Common Law Claims 15

B. The Law of Each Plaintiff's Home State Governs..............................16

IV. LUMPING REQUIRES DISMISSAL OF ALL PLAINTIFFS' CLAIMS 17

V. THE EXPRESS WARRANTY CLAIMS SHOULD BE DISMISSED 18

A. No Claim Lies For Repairs Or Failure Outside The Warranty Period...18

B. The Time/Mileage Terms of the NVLWS Are Not Unconscionable 19

C. Plaintiffs' NVLWS Do Not Cover Design Defects, Which Constitute the Gravamen of Plaintiffs' Claims 22

D. Plaintiffs Have Not Pled Facts Demonstrating Their Compliance with Warranty Notice Requirements 23

E. Plaintiffs Have Not Sufficiently Alleged That Any Warranty Was Part of the Basis of Their Bargain....................25

F. Certain Of Plaintiffs' Breach Of Express Warranty Claims Are Barred By The Statute Of Limitations 27

VI. PLAINTIFFS' IMPLIED WARRANTY OF MERCHANTABILITY CLAIMS MUST BE DISMISSED....................29

A. The Implied Warranties Expired Before the Alleged Defect Manifested and the Subject Vehicles are Merchantable....................29

B. Many of Plaintiffs' Implied Warranty Claims Must Be Dismissed Because Plaintiffs Are Not in Privity with Defendants....................31

C. Plaintiffs Fail to Allege They Provided VW with the Requisite Pre-Suit Notice 34

D. Certain Of Plaintiffs' Breach Of Implied Warranty Claims Are Barred By The Statute Of Limitations 34

VII. PLAINTIFFS MAGNUSON-MOSS WARRANTY ACT CLAIM MUST BE DISMISSED....................36

VIII. PLAINTIFFS' BREACH OF CONTRACT CLAIM MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM....................37

IX. PLAINTIFFS LACK ARTICLE III STANDING TO BRING COMMON-LAW FRAUD, STATUTORY FRAUD OR NEGLIGENT MISREPRESENTATION CLAIMS 39

X. PLAINTIFFS' COMMON-LAW FRAUD CLAIMS FAIL TO PLEAD FRAUD WITH PARTICULARITY 41

A. Plaintiffs Fail to Plead An Actionable Misrepresentation 42

B. Plaintiffs Fail to Plead an Omission of Information that Defendants Were Under a Duty to Disclose 46

i. The Arkansas, New Jersey, Georgia, Illinois, and South Carolina Plaintiffs' Fraudulent Omission Claims Must Be Dismissed Due to the Absence of a Relationship Between Plaintiffs and Defendants Giving Rise to a Duty to Disclose 46

ii. The Ohio and Texas Plaintiffs' Fraudulent Omission Claims Must Be Dismissed Due to the Absence of a Fiduciary Relationship or a Partial Disclosure 48

iii. Plaintiffs Fail to Satisfy the Requirements for Pleading a Duty to Disclose Under the Law of Any Other Jurisdiction 49

1. Plaintiffs Fail to Plead Facts Establishing Defendants' Exclusive or Superior Knowledge 50

2. Plaintiffs Fail to Plead Facts Establishing Active Concealment of a Defect 55

iv. Defendants Have Failed Adequately to Plead Reliance on A Material Omission 56

C. Plaintiffs Cannot Maintain a Fraud Claim Because their Vehicles Outlasted the Time/Mileage Durations of their Express Warranty 57

D. Certain of Plaintiffs' Fraud Claims Are Barred by the Economic Loss Rule 58

XI. PLAINTIFFS' NEGLIGENT MISREPRESENTATION CLAIMS MUST BE DISMISSED 59

XII. PLAINTIFFS' UNJUST ENRICHMENT CLAIMS FAIL 61

XIII. PLAINTIFFS' STATUTORY CONSUMER FRAUD CLAIMS FAIL..64

A. Plaintiffs' Claims Under Consumer Protection Statutes Of Twenty States Fail To Satisfy Rule 9(B) And Must Be Dismissed (Counts VIII-XIII, XV-XXIV, XXVI-XXVII, and XXIX-XXXIV) 64

B. Plaintiffs' Consumer Protection Claims Fail Under the Law of Eighteen States Because They Fail to Allege Practices Likely to Deceive Ordinary Consumers (Counts VIII-XIX, XXI-XXII, XXVIII-XXXII, and XXXIV 68

C. Certain Plaintiffs' Consumer Fraud Claims Under the Laws of Arkansas and New York Should Be Dismissed for Failure to Plead an Injury Other Than Diminution of the Value of Their Vehicles (Counts IX and XXVIII) 70

D. Plaintiffs' Omission-Based Claims Should Be Dismissed Under Georgia's Uniform Deceptive Trade Practices Act and Indiana's Deceptive Consumer Sales Act, Which Do Not Recognize Consumer Fraud Omissions Claims (Counts XVI and XIX) 71

E. Classwide Claims for Damages Are not Allowed Under Colorado's Consumer Protection Act, Georgia's Fair Business Practices Act or South Carolina's Unfair Trade Practices Act (Counts XII, XVII, and XXXII) 71

F. Plaintiffs Impermissibly Seek Money Damages Under Three Consumer Protection Statues that Only Permit Equitable Relief for Such Claims (Counts X, XVI, and XXIV) 72

G. Plaintiffs' Consumer Fraud Claims are Barred by the Economic Loss Doctrine under the Law of Four States (Counts VIII, XXII, XXIX, and XXXI) 73

H. Plaintiffs' Claims Under Connecticut Law Must Be Dismissed for Independent Reasons (Counts XIII and XIV) 74

I. Plaintiffs' Claims under the NJCFA, UCL and CLRA Should Be Dismissed for Independent Reasons (Counts VIII and X-XI)....... 75

J. Plaintiffs Scott's Class Claims Under Ohio's Consumer Sales Protection Act Must Be Dismissed (Count XXX) 76

K. Certain of Plaintiffs' Consumer Protection Claims are Time Barred (Counts XIII, XXVIII and XXX) 78

CONCLUSION 79

TABLE OF AUTHORITIES

Page(s)

Cases

A.O. Smith Corp. v. Elbi S.P.A.,
123 Fed. Appx. 617 (5th Cir. 2005)....38

Abraham v. Volkswagen of Am., Inc.,
795 F.2d 238 (2d Cir. 1986) 2, 19

AFSCME v. Cephalon, Inc.,
790 F. Supp. 2d 313 (E.D. Pa. 2011)....69

AFSCME v. Ortho-McNeil Janssen Pharms., Inc.,
2010 U.S. Dist. LEXIS 23181 (E.D. Pa. Mar. 11, 2010) 24

Against Gravity Apparel, Inc. v. Quarterdeck Corp.,
699 N.Y.S.2d 368 (N.Y. App. Div. 1999)....58

Agnew v. Honda Motor Co.,
2009 U.S. Dist. LEXIS 53914 (S.D. Ind. May 20, 2009)....12

Ahlers v. Ryland Homes Nev. LLC,
2010 Nev. Unpub. LEXIS 209 (Nev. Apr. 16, 2010)....13

Akpele v. Pac. Life Ins. Co.,
646 Fed Appx. 908 (11th Cir. 2016)....14

Alban v. BMW of N. Am.,
2011 U.S. Dist. LEXIS 26754 (D.N.J. Mar. 15, 2011) ....*passim*

Alban v. BMW of N. Am., LLC,
2010 U.S. Dist. LEXIS 94038 (D.N.J. Sep. 8, 2010)....18

Allen v. Andersen Windows, Inc.,
913 F. Supp. 2d 490 (S.D. Ohio 2012)....79

Allen v. De Bello,
2016 U.S. Dist. LEXIS 55900 (D.N.J. Apr. 27, 2016)....72

Allied Fidelity Ins. Co. v. Pico,
99 Nev. 15 (1983) 26

Am. Contrs. Indem. Co. v. Carolina Realty & Dev. Co.,
2012 U.S. Dist. LEXIS 97383, *21 (D.S.C. Mar. 12, 2012)
rejected on other grounds by, 2012 U.S. Dist. LEXIS 94071
(D.S.C. July 9, 2012) 20

Am. Express Co. v. Italian Colors Rest.,
133 S.Ct. 2304 (2013)..6

Am. Family Mut. Ins. Co. v. TAMKO Bldg. Prods.,
2016 U.S. Dist. LEXIS 50408 (D. Colo. Apr. 13, 2016) 19

Am. Honda Motor Co., Inc. v. Superior Court,
132 Cal. Rptr. 3d 91 (2011) 51

Am. Mfg. Co. v. United States Shipping Bd. Emergency Fleet Corp.,
7 F.2d 565 (2d Cir. 1925) 25

Amat v. Rey Pizza Corp.,
2016 U.S. Dist. LEXIS 125054 (S.D. Fla. July 6, 2016) 14

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
133 S.Ct. 1184 (2013)..9

Anonymous v. JP Morgan Chase & Co.,
2005 U.S. Dist. LEXIS 26083 (S.D.N.Y. Oct. 29, 2005)..................................20

Aprigliano v. Am. Honda Motor Co.,
979 F. Supp. 2d 1331 (S.D. Fla. 2013)..60

Aqualon Co. v. Mac Equip., Inc.,
149 F.3d 262 (4th Cir. 1998) 25

Argabright v. Rheem Mfg. Co.,
2016 U.S. Dist. LEXIS 108478 (D.N.J. Aug. 15, 2016) 43, 60

Aron v. U-Haul Co. of Cal.,
143 Cal. App. 4th 796 (2006) 19

Arthur Andersen LLP v. Carlisle,
556 U.S. 624 (2009)...12

Ashcroft v. Iqbal,
556 U.S. 662 (2009)...5

Assocs. of San Lazaro v. San Lazaro Park Props.,
864 P.2d 111 (Colo. 1993)....26

AT&T Mobility, LLC v. Concepcion,
563 U.S. 333 (2011)....5, 6

AT&T Tech., Inc. v. Commcn's Workers of Am.,
475 U.S. 643 (1986)....9

Austin-Spearman v. AARP & AARP Servs. Inc.,
119 F. Supp. 3d 1 (D.D.C. 2015)....40

Babb v. Regal Marine Indus.,
2015 Wash. App. LEXIS 369 (Ct. App. Feb. 24, 2015) 34

Bac Home Loans Serv. v. Farina,
2010 Conn. Super. LEXIS 4929 (Conn. Super. Ct. June 2, 2010)....49

Bain v. Metro. Mortg. Grp., Inc.,
2010 U.S. Dist. LEXIS 22690 (W.D. Wash. Mar. 11, 2010)....68

Baldwin v. Star Sci., Inc.,
2016 U.S. Dist. LEXIS 11952 (N.D. Ill. Feb. 2, 2016)....62

Bardin v. DaimlerChrysler Corp.,
39 Cal. Rptr. 3d 634 (Cal. Ct. App. 2006)....76

Baughan v. Royal Caribbean Cruises, Ltd.,
944 F. Supp. 2d 1216 (S.D. Fla. 2013)....34

Baughn v. Honda Motor Co.,
107 Wash.2d 127 (1986)....31

Bausch v. Philatelic Leasing,
1994 U.S. App. LEXIS 22289 (4th Cir. Aug. 19, 1994)....28

Baye v. HBI Branded Apparel Enters.,
2013 U.S. Dist. LEXIS 174599 (E.D. Mich. Dec. 13, 2013)....26

Beautiful Home Textiles (USA) v. Burlington Coat Factory Warehouse Corp.,
2014 U.S. Dist. LEXIS 114010 (S.D.N.Y. Aug. 15, 2014)....24

Beck v. Trane Co.,
1990 Ohio App. LEXIS 5614 (Ct. App. Dec. 19, 1990) 35

Becker v. Cont'l Motors, Inc.,
2015 U.S. Dist. LEXIS 150996 (N.D. Tex. Nov. 2, 2015) 39

Bedi v. BMW of N. Am.,
LLC, 2016 U.S. Dist. LEXIS 9365 (D.N.J. Jan. 27, 2016) 63

Behnke v. Ahrens,
294 P.3d 729 (Wash. Ct. App. 2012)...69

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)...5

Bender v. Bender,
292 Conn. 696 (2009) 19

Berger v. Accounting Fulfillment Servs. LLC,
2016 U.S. Dist. LEXIS 88782 (M.D. Fla. July 8, 2016) 13

Berlinger v. Wells Fargo, N. A.,
2015 U.S. Dist. LEXIS 141111 (M.D. Fla. Oct. 16, 2015)................................63

Besley v. FCA US LLC,
2016 U.S. Dist. LEXIS 2200 (D.S.C. Jan. 8, 2016) 61

Boardakan Rest. LLC v. Gordon Grp. Holdings, LLC,
2016 U.S. Dist. LEXIS 147298 (E.D. Pa. Oct. 21, 2016) 60

Bourne v. Stewart Title Guaranty Co.,
2011 U.S. Dist. LEXIS 16202 (D.N.H. Feb. 16, 2011)......................................19

Bowser v. MTGLQ Investors, LP,
2015 U.S. Dist. LEXIS 105967 (D.N.H. 2015)..61

Brainard v. Freightliner Corp.,
2002 U.S. Dist. LEXIS 18617 (W.D.N.Y. Oct. 1, 2002) 27

Breeden v. Richmond Community College,
171 F.R.D. 189 (M.D.N.C. 1997) 60

Brisson v. Ford Motor Co.,
602 F.Supp.2d 1227 (M.D. Fla. 2009), *aff'd in relevant part and rev'd on other grounds*, 349 F. App'x 433 (11th Cir. 2009)..............................29

Bruce Martin Constr. v. CTB, Inc.,
735 F.3d 750 (8th Cir. 2013) 22

Burns v. Winnebago Indus., Inc.,
2013 U.S. Dist. LEXIS 116377 (M.D. Fla. Aug. 16, 2013)...............................59

Burton v. R.J. Reynolds Tobacco Co.,
884 F. Supp. 1515 (D. Kan. 1995)...65

Bushendorf v. Freightliner Corp.,
13 F.3d 1024 (7th Cir. 1993) 32

Butala v. Agashiwala,
916 F. Supp. 314 (S.D.N.Y. 1996) 28

Cali v. Chrysler Gp. LLC,
2011 U.S. Dist. LEXIS 5220 (S.D.N.Y. Jan. 18, 2011) 22

Cardinal Health 301, Inc. v. Tyco Elecs. Corp.,
87 Cal. Rptr. 3d 5 (Ct. App. 2008) 35

CardioNet, Inc. v. Cigna Health Corp.,
751 F.3d 165 (3d Cir. 2014) 10, 11

Carter v. Wynn Las Vegas,
2011 U.S. Dist. LEXIS 76528 (D. Nev. July 14, 2011) 14

Catalano v. BMW of N. Am., LLC,
2016 U.S. Dist. LEXIS 25622 (S.D.N.Y. Mar. 1, 2016)...................................34

Catrett v. Landmark Dodge, Inc.,
560 S.E.2d 101 (Ga. Ct. App. 2002)..73

Cavanagh v. Ford Motor Co.,
2014 U.S. Dist. LEXIS 68504 (E.D.N.Y. May 19, 2014)..................................26

CH2E Nev., LLC v. Mahjoob,
2015 U.S. Dist. LEXIS 143068 (D. Nev. Oct. 21, 2015) 61

Chattem v. BAC Home Loan Servicing LP,
2012 U.S. Dist. LEXIS 78412 (D. Nev. June 5, 2012) 65

Chi. Male Med. Clinic, Inc. v. Ultimate Mgmt.,
2012 U.S. Dist. LEXIS 183257 (N.D. Ill. Dec. 28, 2012)..................................65

Chiarelli v. Nissan N. Am., Inc.,
2015 U.S. Dist. LEXIS 129416 (E.D.N.Y. 2015) 43, 44, 62

Ciba-Geigy Corp. v. Alter,
309 Ark. 426 (1992)..26

Clemens v. DaimlerChrysler Corp.,
534 F.3d 1017 (9th Cir. 2008) 31, 38

Coba v. Ford Motor Co.,
2013 U.S. Dist. LEXIS 8366 (D.N.J. Jan 22, 2013).....................................35, 47

Coghlan v. Wellcraft Marine Corp.,
240 F.3d 449 (5th Cir. 2001) 62

Collins v. A-1 Auto Service, Inc.,
2013 Conn. Super. LEXIS 120 (Super. Ct. 2013) 27, 35

Connick v. Suzuki Motor Co.,
174 Ill. 2d 482 (1996) 24, 25

Cooper v. Samsung Elecs. Am., Inc.,
2008 U.S. Dist. LEXIS 75810 (D.N.J. Sep. 30, 2008) 36

Copeland v. Albion Labs., Inc.,
2015 U.S. Dist. LEXIS 154757 (W.D. Wash. Nov. 16, 2015)...........................63

Corsello v. Verizon N.Y., Inc.,
967 N.E.2d 1177 (N.Y. 2013)...78

Cotner v. Int'l Harvester Co.,
260 Ark. 885 (1977)..23, 25

Criteria II v. Co-Opportunity Precision Wood Prods.,
2001 Conn. Super. LEXIS 2548 (Super. Ct. Aug. 30, 2001) 26

Cullen v. BMW of N. Am., Inc.,
531 F. Supp. 555 (E.D.N.Y. 1982) 34

Curl v. Volkswagen of Am., Inc.,
114 Ohio St. 3d 266 (2007) 31

Daigle v. Ford Motor Co.,
713 F. Supp. 2d 822 (D. Minn. 2010)...37

Daugherty v. Am. Honda Motor Co.,
51 Cal. Rptr. 3d 4th 118 (Cal. Ct. App. 2006)
....57, 58, 69, 76

Daugherty v. American Honda Motor Co.,
144 Cal. App. 4th 824 (2006) 19

Davis v. Byers Volvo,
2012-Ohio-882 (Ct. App.) 43, 69

Davisson v. Ford Motor Co.,
2014 U.S. Dist. LEXIS 122673 (S.D. Ohio Sep. 3, 2014) 51

Day v. Tri-State Delta Chemicals, Inc.,
165 F. Supp. 2d 830 (E.D. Ark. 2001)...55

Dean v. Beckley,
2010 U.S. Dist. LEXIS 105007 (D. Md. Oct. 1, 2010) 49

Deeds v. Waddell & Reed Inv. Mgmt. Co.,
280 P.3d 786 (Kan. Ct. App. 2012) 62

Deem v. Mi Windows & Doors Inc.,
2012 U.S. Dist. LEXIS 149756 (D.S.C. Oct. 18, 2012)......................................73

Deluca v. River Bluff Holdings II, LLC,
2015 NCBC 11, P47 (N.C. Super. Ct. 2015)...69

Demorato v. Carver Boat Corp.,
2007 U.S. Dist. LEXIS 35758 (D.N.J. May 16, 2007).......................................61

Dering v. Serv. Experts Alliance LLC,
2007 U.S. Dist. LEXIS 89972 (N.D. Ga. Dec. 6, 2007) 72

Deutsche Bank Nat'l Tr. Co., v. Lacapria,
2010 U.S. Dist. LEXIS 17998 (D.N.J. Mar. 1, 2010) 19

DirecTV v. Imburgia,
136 S.Ct. 463 (2015)..6

Doll v. Ford Motor Co.,
814 F. Supp. 2d 526 (D. Md. Aug. 25, 2011)..24

DTI Enters., LLC v. Cardiology Assocs. of Derby, P.C.,
2014 Conn. Super. LEXIS 276 (Conn. Super. Ct. Feb. 4, 2014) 68

Duffy v. Samsung Elecs. Am., Inc.,
2007 U.S. Dist. LEXIS 14792 (D.N.J. Mar. 2, 2007) 57, 76

Duquesne Light Co. v. Westinghouse Elec. Corp.,
66 F.3d 604 (3d Cir. 1995) 18

Durkee v. Ford Motor Co.,
2014 U.S. Dist. LEXIS 122857 (N.D. Cal. Sep. 2, 2014) 72

E. River S.S. Corp. v. Transamerica Delaval, Inc.,
476 U.S. 858 (1986)..58, 60

Eberhart v. LG Elecs. USA, Inc.,
2015 U.S. Dist. LEXIS 173073, 17 (D.N.J. Dec. 30, 2015)............................26

Ebner v. Fresh, Inc.,
2016 U.S. App. LEXIS 4875 (9th Cir. Mar. 17, 2016) 62

Ebner v. Fresh, Inc.,
838 F.3d 958 (9th Cir. 2016) 68

Elder v. BMO Harris Bank,
2014 U.S. Dist. LEXIS 50194 (D. Md. Apr. 11, 2014)...........................13, 14

Elliot v. Sears, Roebuck & Co.,
642 A.2d 709 (Conn. 1994) 75

Ellis v. Precision Engine Rebuilders, Inc.,
68 S.W.3d 894 (Tex. App. 2002)..39

Encore D.E.C., LLC v. APES I, LLC,
2015 U.S. Dist. LEXIS 110412 (W.D. Wash. Aug. 20, 2015)............................60

Energy Four, Inc. v. Dornier Med. Systems, Inc.,
765 F. Supp. 724 (N.D. Ga. 1991)...71

Falco v. Nissan North Am., Inc.,
2013 U.S. Dist. LEXIS 147060 (C.D. Cal. Oct. 10, 2013) 44

Fanion v. Radei,
2009 Conn. Super. LEXIS 2675 (Conn. Super. Ct. Oct. 16, 2009) 60

Farash & Robbins, Inc. v. Fleet Nat'l Bank,
2005 U.S. Dist. LEXIS 33810 (D.N.J. Dec. 16, 2005)...73

Feldman v. Mercedes-Benz United States, LLC,
2012 U.S. Dist. LEXIS 178924 (D.N.J. Dec. 18, 2012)................................38, 39

Ferron v. SubscriberBase Holdings, Inc.,
2009 U.S. Dist. LEXIS 23583 (S.D. Ohio Mar. 10, 2009)...................................65

Fifth Third Bank v. Double Tree Lake Estates, LLC,
2013 U.S. Dist. LEXIS 20234 (N.D. Ind. Feb. 12, 2013) 49

Ford Motor Co. v. Ables,
207 Fed. App'x 443 (5th Cir. 2006) 12

Francis v. Mead Johnson & Co.,
2010 U.S. Dist. LEXIS 137630 (D. Colo. Dec. 17, 2010) 62

Frank v. DaimlerChrysler Corp.,
741 N.Y.S.2d 9 (N.Y. App. Div. 2002)...70

Frederick Rd. Ltd. P'shp. v. Brown & Sturm,
756 A.2d 963 (Md. 2000) 55

Frey v. Grumbine's RV,
2010 U.S. Dist. LEXIS 120659 (M.D. Pa. Nov. 15, 2010)..................................37

Friedmann v. United States,
107 F. Supp. 2d 502 (D.N.J. 2000)..9

Gagner v. Chrysler Corp.,
1994 Conn. Super. LEXIS 3093 (Conn. Super. Ct. Dec. 5, 1994)......................75

Gaines v. Krawczyk,
354 F. Supp. 2d 573 (W.D. Pa. 2004)..50

Galicki v. New Jersey,
2015 U.S. Dist. LEXIS 84365 (D.N.J. June 29, 2015).......................................17

Galoski v. Stanley Black & Decker, Inc.,
2015 U.S. Dist. LEXIS 114663 (N.D. Ohio Aug. 28, 2015)..............................59

Garcia v. Chrysler Corp.,
127 F. Supp. 3d 212 (S.D.N.Y. 2015) 24, 25

Garcia v. Clarins USA, Inc.,
2014 U.S. Dist. LEXIS 182426 (S.D. Fla. Sep. 4, 2014) 24

Garcia v. Universal Mortg. Corp.,
2013 U.S. Dist. LEXIS 63445 (N.D. Tex. May 3, 2013) 20

Gator Dev. Corp. v. VHH, Ltd.,
2009-Ohio-1802 (Ohio Ct. App. Apr. 17, 2009) 48

Gedalia v. Whole Foods Mkt. Servs., Inc.,
53 F. Supp. 3d 943 (S.D. Tex. Sep. 30, 2014)..26

Gennari v. Weichert Co. Realtors,
691 A.2d 350 (N.J. 1997) 67

Gertz v. Toyota Motor Corp.,
2011 U.S. Dist. LEXIS 94183 (C.D. Cal. Aug. 22, 2011) 23

Gianninoto v. IRS,
2016 Bankr. LEXIS 3016 (Bankr. D.N.J. Aug. 15, 2016) 41

Gillson v. City of Sparks,
2007 U.S. Dist. LEXIS 19350 (D. Nev. Mar. 19, 2007) 31

Glass v. BMW of N. Am.,
2011 U.S. Dist. LEXIS 149199 (D.N.J. Dec. 29, 2011).........................29, 30, 52

Glidden Co. v. Jandernoa,
5 F. Supp. 2d 541 (W.D. Mich. 1998) 50

Goldman v. KPMG, LLP,
92 Cal. Rptr. 3d 534 (Cal. Ct. App. 2009)..13

Goodman v. HTC Am., Inc.,
2012 U.S. Dist. LEXIS 88496 (W.D. Wash. June 26, 2012) 65

Goodwin v. Ford Motor Credit Co.,
970 F. Supp. 1007 (M.D. Ala. 1997)..12

Gotthelf v. Toyota Motor Sales, U.S.A., Inc.,
525 F. App'x 94 (3d Cir. 2013) 53

Grand Wireless, Inc. v. Verizon Wireless, Inc.,
748 F.3d 1 (1st Cir. 2014)..10

Graphic Commc'ns. Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp.,
850 N.W.2d 682 (Minn. 2014) 50, 67

Great N. Ins. Co. v. Cornerstone Custom Home Builders,
2016 U.S. Dist. LEXIS 94344 (M.D. Ga. July 20, 2016)...................................13

Green v. Wells Fargo Bank, N.A.,
927 F. Supp. 2d 244 (D. Md. 2013)...69

Greenberger v. GEICO General Ins. Co.,
631 F.3d 392 (7th Cir. 2011) 47

Greene v. BMW of N. Am.,
2012 U.S. Dist. LEXIS 168695 (D.N.J. Nov. 28, 2012) 37

Greene v. BMW of N. Am.,
2013 U.S. Dist. LEXIS 132579 (D.N.J. 2013) 38

Griffith v. Centex Real Estate Corp.,
969 P.2d 486 (Wash. Ct. App. 1998)...61

Gwyn v. Loon Mountain Corp.,
2002 U.S. Dist. LEXIS 9092 (D.N.H. May 15, 2002) 65

Haag v. Hyundai Motor Am.,
969 F. Supp. 2d 313 (W.D.N.Y. 2013) 38

Hackett v. BMW of N. Am., LLC,
2011 U.S. Dist. LEXIS 71063 (N.D. Ill. June 30, 2011) 33

Hammer v. Vital Pharms., Inc.,
2012 U.S. Dist. LEXIS 40632 (D.N.J. Mar. 26, 2012) 24

Hansen v. Auto-Owners Ins. Co.,
2010 U.S. Dist. LEXIS 25431 (D. Colo. Mar. 4, 2010) 65

Harnden v. Ford Motor Co.,
408 F. Supp. 2d 315 (E.D .Mich. 2005) 31

Harnish v. Widener Uni. Sch. of Law,
833 F.3d 298 (3d Cir. 2016) 40

Hawkins v. O'Brien,
2009 Ohio App. LEXIS 73 (Jan. 9, 2009) 20

Heldenbrand v. Multipoint Wireless, LLC,
2012 U.S. Dist. LEXIS 150634 (D. Nev. Oct. 18, 2012) 50

Henderson v. Legal Helpers Debt Resolution, LLC,
486 B.R. 343 (Bankr. S.D. Miss. 2013) 10

Hendricks v. Callahan,
972 F.2d 190 (8th Cir. 1992) 26

Hensley v. Colonial Dodge, Inc.,
245 N.W.2d 142 (Mich. Ct. App. 1976) 35

Herman v. Bridgewater Park Apts.,
2016 U.S. Dist. LEXIS 29569 (E.D. Mich. Mar. 3, 2016) 62

Herne v. Cooper Indus.,
2005 U.S. Dist. LEXIS 24371 (D.N.H. Oct. 19, 2005) 24

Herremans v. BMW of N. Am., LLC,
2014 U.S. Dist. LEXIS 145957 (C.D. Cal. Oct. 3, 2014) 33

Herron v. Best Buy Co.,
924 F. Supp. 2d 1161 (E.D. Cal. 2013) 67

Heyman v. Citimortgage, Inc.,
2014 U.S. Dist. LEXIS 129025 (D.N.J. Sep. 15, 2014) 42

Hines v. Overstock.com, Inc.,
2013 U.S. Dist. LEXIS 117141 (E.D.N.Y. Aug. 19, 2013) 15

Hirsch v. Amper Financial Services, LLC,
71 A.3d 849 (N.J. 2013) 11

Hobco, Inc. v. Tallahassee Assoc.,
807 F.2d 1529 (11th Cir. 1987) 26

Holdridge v. Heyer-Schulte Corp.,
440 F. Supp. 1088 (N.D.N.Y. 1977) 35

Home Owners Ins. Co. v. ADT LLC,
109 F. Supp. 3d 1000 (E.D. Mich. 2015) 65

Horowitz v. Stryker Corp.,
613 F. Supp. 2d 271 (E.D.N.Y. 2009) 26

Hospira Inc. v. AlphaGary Corp.,
671 S.E.2d 7 (N.C. Ct. App. 2009) 34

Hrosik v. J. Keim Builders,
345 N.E.2d 514 (Ill. App. Ct. 1976) 26

Hurley v. Heart Physicians, P.C.,
898 A.2d 777 (Conn. 2006) 74

Ibarolla v. Nutrex Research, Inc.,
2012 U.S. Dist. LEXIS 155721 (N.D. Ill. Oct. 31, 2012) 31

Ibarrola v. Kind, LLC,
2014 U.S. Dist. LEXIS 95833 (N.D. Ill. July 14, 2014) 69

In re Aftermarket Filters Antitrust Litig.,
2010 U.S. Dist. LEXIS 32652 (N.D. Ill. Apr. 1, 2010 63

In re Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prods. Liab. Litig.,
2013 U.S. Dist. LEXIS 7009 (D.S.C. Jan. 16, 2013) 73

In re Carrier IQ, Inc., Consumer Privacy Litig.,
78 F. Supp. 3d 1051 (N.D. Cal. 2015)..67

In re Elk Cross Timbers Decking Mktg., Sales Practices & Prods. Liab. Litig.,
2015 U.S. Dist. LEXIS 144790 (D.N.J. Oct. 26, 2015) (Linares, J.)...........59, 60

In re Ford Motor Co. E-350 Van Prods. Liab. Litig.,
2010 U.S. Dist. LEXIS 68241 (D.N.J. July 9, 2010) 63

In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.,
174 F.R.D. 332 (D.N.J. 1997)...16, 17

In re Ford Tailgate Litig.,
2014 U.S. Dist. LEXIS 119769 (N.D. Cal. Aug. 8, 2014) 61

In re Gerber Probiotic Sales Practices Litig.,
2013 U.S. Dist. LEXIS 121192 (D.N.J. Aug. 22, 2013) 41

In re K-Dur Antitrust Litig.,
338 F. Supp. 2d 517 (D.N.J. 2004)...1

In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.,
21 F. Supp. 2d 593 (E.D. La. 1998)...34

In Re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liab. Litig.,
880 F. Supp. 2d 801 (S.D. Ohio 2012) 77

In re Premera Blue Cross Customer Data Sec. Breach Litig.,
2016 WL 4107717 (D. Or. Aug. 1, 2016) 55

In re Refrigerant Compressors Antitrust Litig.,
2013 U.S. Dist. LEXIS 50737 (E.D. Mich. Apr. 9, 2013) 63

In re Scotts EZ Seed Litig.,
2013 U.S. Dist. LEXIS 73808 (S.D.N.Y. May 22, 2013) 31, 33

In re: Shop-Vac Mktg. & Sales Practices Litig.,
964 F. Supp. 2d 355 (M.D. Pa. 2013)........25

In re Static Random Access Memory (SRAM) Antitrust Litig.,
580 F. Supp. 2d 896 (N.D. Cal. 2008)........15

In re Supreme Specialties Inc. Sec. Litig.,
438 F.3d 256 (3d Cir. 2006)........46

In re Target Corp. Customer Data Sec. Breach Litig.,
64 F. Supp. 3d 1304 (D. Minn. 2014)........60

In re Toshiba Am. HD DVD Mktg. & Sales Practices Litig.,
2009 U.S. Dist. LEXIS 82833 (D.N.J. Sep. 10, 2009)........25

In re Trilegiant Corp.,
11 F. Supp. 3d 82 (D. Conn. 2014)........65

In re Viagra Prods. Liab. Litig.,
658 F. Supp. 2d 950 (D. Minn. 2009)........62

In re Wellbutrin XL Antitrust Litig.,
260 F.R.D. 143 (E.D. Pa. 2009)........15

In re Zappos.com, Inc.,
2013 U.S. Dist. LEXIS 128155 (D. Nev. Sept. 9, 2013)........63

Industrial Graphics, Inc. v. Asahi Corp.,
485 F. Supp. 793 (D. Minn. 1980)........26

J. C. Penney Props. v. Hiram LL, LLC,
2016 U.S. Dist. LEXIS 8027 (N.D. Ga. Jan. 25, 2016)........34

Jarrett v. Panasonic Corp. of N. Am.,
8 F. Supp. 3d 1074 (E.D. Ark. 2013)........62, 64, 68

Jasper v. Abbott Labs., Inc.,
834 F. Supp. 2d 766 (N.D. Ill. 2011)........24

Jensen Enters., Inc. v. Poisson Communs., Inc.,
2013 U.S. Dist. LEXIS 128948 (D. Nev. Sept. 6, 2013)........62

Johnson v. Microsoft Corp.,
802 N.E.2d 712 (Ohio Ct. App. 2003)..77

Justice v. Rheem Mfg. Co.,
2014 U.S. Dist. LEXIS 179128 (S.D. Fla. Aug. 21, 2014) 28

Kahama VI, LLC v. HJH, LLC,
2013 U.S. Dist. LEXIS 174032 (M.D. Fla. Dec. 12, 2013) 60

Kahn v. Volkswagen of Am., Inc.,
2008 Conn. Super. LEXIS 376 (Feb. 13, 2008) 33

Kearns v. Ford Motor Co.,
567 F.3d 1120 (9th Cir. 2009) 64

Keegan v. Am. Honda Motor Co,
838 F. Supp. 2d 929 (C.D. Cal. 2012)..33

Kelleher v. Marvin Lumber & Cedar Co.,
152 N.H. 813 (2005)..26

Kelly v. Ga.-Pac. LLC,
671 F. Supp. 2d 785 (E.D.N.C. 2009) 31

Kelton v. Hollis Ranch, LLC,
927 A.2d 1243 (N.H. 2007)...67

Kestrel Holdings I, L.L.C. v. Learjet Inc.,
316 F. Supp. 2d 1071 (D. Kan. 2004)...49

King v. Philip Morris, Inc.,
2000 N.H. Super. LEXIS 5 (N.H. Super. Ct. 2000) 50

Kirsopp v. Yamaha Motor Co.,
2015 U.S. Dist. LEXIS 68639 (C.D. Cal. Jan. 7, 2015).....................................34

Klaxon Co. v. Stentor Elec. Mfg. Co.,
313 U.S. 487 (1941)...16

Kline v. Mortg. Elec. Sec. Sys.,
2010 U.S. Dist. LEXIS 143391 (S.D. Ohio Dec. 30, 2010)...............................77

Klinger v. Wells Fargo Bank, NA,
2010 U.S. Dist. LEXIS 111683 (W.D. Wash. Oct. 20, 2010)............................62

Knopke v. Ford Motor Co.,
2014 U.S. Dist. LEXIS 158928, 12 (D. Kan. Nov. 10, 2014)............................19

Korea Week, Inc. v. GOT Capital, LLC,
2016 U.S. Dist. LEXIS 69646 (E.D. Pa. May 27, 2016)....................................20

Krieger v. Gast,
2000 U.S. Dist. LEXIS 3097 (W.D. Mich. Jan. 21, 2000).................................60

Kunzelmann v. Wells Fargo Bank, N.A.,
2013 U.S. Dist. LEXIS 3962 (S.D. Fla. Jan. 10, 2013)......................................63

LaChance v. Day,
2012 Conn. Super. LEXIS 593 (Conn. Super. Ct. 2012) 78

Lackowski v. Twinlab Corp.,
2001 U.S. Dist. LEXIS 25633 (E.D. Mich. Dec. 21, 2001) 69

Lau v. Mercedes-Benz USA, LLC,
2012 U.S. Dist. LEXIS 11358 (N.D. Cal. Jan. 31, 2012)..................................12

Lautzenhiser v. Coloplast A/S,
2012 U.S. Dist. LEXIS 142657 (S.D. Ind. Sep. 29, 2012).................................60

Lawson v. Hale,
902 N.E.2d 267 (Ind. Ct. App. 2009) 71

Lee v. Toyota Motor Sales, U.S.A., Inc.,
992 F. Supp. 2d 962 (C.D. Cal. 2014) 37, 38

Leonhart v. Nature's Path Foods, Inc.,
2014 U.S. Dist. LEXIS 164425 (N.D. Cal. Nov. 21, 2014) 26

Licul v. Volkswagen Group of Am.,
2013 U.S. Dist. LEXIS 171627 (S.D. Fla. Dec. 5, 2013).......................19, 21, 22

Lilliston v. Regions Bank,
653 S.E.2d 306 (Ga. Ct. App. 2007)...46

Long v. Jim Letts Oldsmobile, Inc.,
217 S.E.2d 602 (Ga. Ct. App. 1975)....................61

Lovell v. P.F. Chang's China Bistro, Inc.,
2015 U.S. Dist. LEXIS 112101 (W.D. Wash. Mar. 27, 2015)....................50

LRP Hotels of Carolina, LLC v. Westfield Ins. Co.,
2014 U.S. Dist. LEXIS 154909 (E.D.N.C. Oct. 31, 2014)....................61

Lucker v. Bay Cemetery,
979 N.Y.S.2d 8 (N.Y. App. Div. 2013)....................78

Lucre, Inc. v. ADC Telcoms.,
2002 U.S. Dist. LEXIS 15421 (W.D. Mich. Aug. 16, 2002)....................19

Luig v. North Bay Enters.,
55 F. Supp. 3d 942 (N.D. Tex. 2014)....................39

Mack Trucks, Inc. v. Borgwarner Turbo Sys.,
508 F. App'x. 180 (3d Cir. 2012)....................22

Mallon Oil Co. v. Bowen/Edwards Assocs., Inc.,
965 P.2d 105 (Colo. 1998)....................49

Malone v. Tamko Roofing Prods.,
2013 U.S. Dist. LEXIS 145530 (W.D.N.C. Oct. 8, 2013)....................59

Mance v. Mercedes-Benz USA,
901 F. Supp. 2d 1147 (N.D. Cal. Sep. 28, 2012)....................12

Maniscalo v. Brother Int'l (USA) Corp.,
709 F.3d 202 (3d Cir. 2013)....................17

Marchante v. Sony Corp. of Am.,
801 F. Supp. 2d 1013 (S.D. Cal. July 8, 2011)....................20

Marmet Health Care Ctr., Inc. v. Brown,
565 U.S. 530 (2012)....................6

Marrone v. Philip Morris USA, Inc.,
850 N.E. 2d 31 (Ohio 2006)....................77

Martin v. Ford Motor Co.,
292 F.R.D. 252 (E.D. Pa. 2013)..62

Martinez v. Nash Finch Co.,
886 F. Supp.2d 1212 (D. Colo. 2012)..72

Marvin Lumber and Cedar v. PPG Indus., Inc.,
223 F.3d 873 (8th Cir. 2000) 35, 61

Matthews v. Am. Honda Motor Co.,
2012 U.S. Dist. LEXIS 90802 (S.D. Fla. June 6, 2012)...................................67

Maxwell v. Remington Arms Co., LLC,
2014 U.S. Dist. LEXIS 158153 (M.D.N.C. Nov. 7, 2014) 26

McKinney v. Bayer Corp.,
744 F. Supp. 2d 733 (N.D. Ohio Sep. 30, 2010) 33

McQueen v. BMW of N. Am., LLC,
2014 U.S. Dist. LEXIS 21084 (D.N.J. Feb. 20, 2014) 18

MDNet, Inc. v. Pharmacia Corp.,
147 F. App'x 239 (3d Cir. 2005) 17

Meadow v. NIBCO, Inc.,
2016 U.S. Dist. LEXIS 68903 (M.D. Tenn. May 24, 2016) 65

Medical Herald Publishing Co., Inc., v. J.P. Morgan Chase Bank, N.A.,
2014 U.S. Dist. LEXIS 169127 (S.D.N.Y. Nov. 25, 2014)...............................78

Mercer Cnty. Children's Med. Daycare, LLC v. O'Dowd,
2015 U.S. Dist. LEXIS 124874 (D.N.J. Sept. 18, 2015)..................................41

Meschke v. Orthalliance, Inc.,
2002 U.S. Dist. LEXIS 11620 (D. Kan. June 24, 2002) 60

Miller v. Chrysler Group LLC,
2014 U.S. Dist. LEXIS 90314 (D.N.J. June 30, 2014).....................................37

Montgomery v. Kraft Foods Glob., Inc.,
2012 U.S. Dist. LEXIS 173035 (W.D. Mich. Dec. 6, 2012).............................34

Monticello v. Winnebago Indus.,
369 F. Supp. 2d 1350 (N.D. Ga. 2005)..31

Moore v. Microsoft Corp.,
741 N.Y.S.2d 91 (N.Y. App. Div. 2002)..58

Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.,
460 U.S. 1 (1983)..5, 9

Moulton v. LG Elec., Inc.,
2012 U.S. Dist. LEXIS 162389 (D.N.J. Nov. 14, 2012) 19

Mukamal v. GE Capital Corp. (In re Palm Beach Fin. Partners, L.P.),
517 B.R. 310 (Bankr. S.D. Fla. 2013) 49

Murphy v. P&G,
695 F. Supp. 2d 600 (E.D. Mich. 2010) 59

Muss v. Mercedes-Benz of N. Am., Inc.,
734 S.W.2d 155 (Tex. App. 1987)..27

N.J. Econ. Dev. Auth. v. Pavonia Rest., Inc.,
319 N.J. Super. 435 (App. Div. 1998)..46

Nakajima All Co. v. SL Ventures, Corp.,
2001 U.S. Dist. LEXIS 7535 (N.D. Ill. May 31, 2001)...................................65, 74

Naporano Iron & Metal Co. v. Am. Crane Corp.,
79 F. Supp. 2d 494 (D.N.J. 1999)..65

Nayal v. HIP Network Servs. IPA, Inc.,
620 F. Supp. 2d 566 (S.D.N.Y. 2009) 20

Neal v. Asta Funding, Inc.,
2013 U.S. Dist. LEXIS 170801 (D.N.J. Dec. 4, 2013)...9

Nelson v. Nissan N. Am. Inc.,
2014 U.S. Dist. LEXIS 175222 (D.N.J. Dec. 19, 2014)..................................22, 23

Newby v. Enron Corp.,
540 F. Supp. 2d 800 (S.D. Tex. 2007)..60

Nicholson v. Jayco, Inc.,
2016 U.S. Dist. LEXIS 134469 (N.D. Ohio Sep. 29, 2016)....33

Nobile v. Ford Motor Co.,
2011 U.S. Dist. LEXIS 26766 (D.N.J. Mar. 14, 2011) 57, 76

Noble v. Porsche Cars N. Am., Inc.,
694 F. Supp. 2d 333 (D.N.J. 2010)....57, 75, 76

O'Berry v. Gray,
510 So. 2d 1135 (Fla. Dist. Ct. 1987)....21

Ocana v. Ford Motor Co.,
992 So. 2d 319 (Fla. Dist. Ct. App. 2008)....33

OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.,
68 Cal. Rptr. 3d 828 (Cal. Ct. App. 2007)....59

Odom v. Ford Motor Co.,
95 S.E.2d 601 (S.C. 1956) 26

Okada v. Nev. Prop. 1 LLC,
2015 U.S. Dist. LEXIS 124227 (D. Nev. Sep. 17, 2015)....20

Orlando v. Novurania of Am., Inc.,
162 F. Supp. 2d 220 (S.D.N.Y. 2001) 59

Ossolinski v. Ford Motor Co.,
2014 Conn. Super. LEXIS 1994 (Conn. Super. Ct. Aug. 12, 2014) 37

Ostreriecher v. Alienware Corp.,
544 F.Supp.2d 964 (N.D. Cal. 2008)....76

Outboard Marine Corp. v. Babcock Indus., Inc.,
1995 U.S. Dist. LEXIS 6429 (N.D. Ill. May 10, 1995)....34

P.V. ex. rel. T.V. v. Camp Jaycee,
197 N.J. 132 (2008) 16

Park v. Inovio Pharms., Inc.,
2016 U.S. Dist. LEXIS 24993 (D.N.J. Mar. 1, 2016) 59

Park-Kim v. Daikin Indus.,
2016 U.S. Dist. LEXIS 104248 (C.D. Cal. Aug. 3, 2016) 23

Patel v. Holiday Hosp. Franchising, Inc.,
172 F. Supp. 2d 821 (N.D. Tex. 2001) 65

Patterson v. McMickle,
191 S.W.3d 819 (Tex. App. 2004)..67

Perez v. Volkswagen Grp. of Am.,
No. 2:12-CV-02289, 2013 U.S. Dist. LEXIS 54845 (W.D. Ark.
Apr. 17, 2013)..47, 67

Perkins v. DaimlerChrysler Corp.,
112, 890 A.2d 997 (N.J. Super. Ct. App. Div. 2006) 57

Peterson v. Aaron's, Inc.,
2015 U.S. Dist. LEXIS 123320 (N.D. Ga. Sept. 15, 2015).......................63

Philips v. Ford Motor Co.,
2015 U.S. Dist. LEXIS 88937 (N.D. Cal. July 7, 2015) 72

Pitts v. Jackson Nat'l Life Ins. Co.,
574 S.E.2d 502 (S.C. Ct. App. 2002) 47

Plymouth Pointe Condo. Ass'n v. Delcor Homes-Plymouth Pointe,
2003 Mich. App. LEXIS 2742 (Mich. Ct. App. Oct. 28, 2003)..................19, 21

Popham v. Keystone RV Co.,
2016 U.S. Dist. LEXIS 127093 (N.D. Ind. Sep. 19, 2016) 19

Price Bros. Co. v. Phila. Gear Corp.,
649 F.2d 416 (6th Cir. 1981) 26

Pugh v. Tribune Co.,
521 F.3d 686 (7th Cir. 2008) 54

Quigley v. Esquire Deposition Services, LLC,
975 A.2d 1042 (N.J. Super. Ct. App. Div. 2009) 69

R&O Constr. Co. v. Rox Pro Int'l Group, Ltd.,
2011 U.S. Dist. LEXIS 131633 (D. Nev. Nov. 14, 2011).........................34

Rachal v. Reitz,
403 S.W.3d 840 (Tex. 2013) 13

Reed v. Sears, Roebuck & Co.,
934 F. Supp. 713 (D. Md. 1996)..26

Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.,
68 F.3d 1478 (2d Cir. 1995) 50

Rhino Linings United States v. Rocky Mt. Rhino Lining,
62 P.3d 142 (Colo. 2003)...68

Robins v. Chrysler Group LLC,
2015 Ohio Misc. LEXIS 21929 (Ohio Ct. Com. Pl. Jan 12, 2015)....................27

Rockford Memorial Hosp. v. Havrilesko,
858 N.E.2d 56 (Ill. App. Ct. 2006) 67

Rollander Enters. v. H.C. Nutting Co.,
2011 Ind. App. Unpub. 61

Rosipko v. FCA US, LLC,
2015 U.S. Dist. LEXIS 163455 (E.D. Mich. Dec. 7, 2015) 24

Rotorex Co., Inc. v. Kingsbury Corp.,
42 F. Supp. 2d 563 (D. Md. 1999)..61

Ryden v. Tomberlin Auto. Grp.,
2012 U.S. Dist. LEXIS 139212 (S.D. Ind. Sep. 27, 2012)................................26

Sabines Syngas, Ltd. v. Port of Port Arthur,
2011 Tex. App. LEXIS 228 (Tex. App. 2011) 14

Sabol v. Ford Motor Co.,
2015 U.S. Dist. LEXIS 92341 (E.D. Pa. July 16, 2015) 59

Safeway Stores, Inc. v. Certainteed Corp.,
710 S.W.2d 544 (Tex. 1986) 35

Sanford v. Bracewell & Guiliani,
618 Fed. Appx. 114 (3d Cir. 2015)...8

Sani-Pure Food Labs., LLC v. Biomerieux, Inc.,
2014 U.S. Dist. LEXIS 160536 (D.N.J. Nov. 13, 2014) 24

Sapp v. Ford Motor Co.,
687 S.E.2d 47 (S.C. 2009) 59

Savett v. Whirlpool Corp.,
2012 U.S. Dist. LEXIS 124086 (N.D. Ohio Aug. 31, 2012)........................63, 79

Schmidt v. Ford Motor Co.,
972 F. Supp. 2d 712 (E.D. Pa. 2013)...63

Scott v. Honeywell Int'l Inc.,
2015 U.S. Dist. LEXIS 42194 (D. Colo. Mar. 30, 2015) 59

Sears, Roebuck & Co. v. Tyco Fire Prods. LP,
833 F. Supp. 2d 892 (N.D. Ill. 2011)...42, 44

Sedelnikova v. Cheesecake Factory Rest. Inc.,
2010 U.S. Dist. LEXIS 56211 (D. Md. June 7, 2010).......................................19

Sheris v. Nissan N. Am., Inc.,
2008 U.S. Dist. LEXIS 43664 (D.N.J. June 2, 2008)..30

Silverstein v. Percudani,
2005 U.S. Dist. LEXIS 10005 (M.D. Pa. May 26, 2005)..................................67

Simmons v. Modern Aero, Inc.,
603 N.W.2d 336 (Minn. Ct. App. 1999)..72

Skeen v. BMW of N. Am., LLC,
2014 U.S. Dist. LEXIS 9256 (D.N.J. Jan. 24, 2014)...43

Smith v. Cent. Soya of Athens, Inc.,
604 F. Supp. 518 (E.D.N.C. 1985) 65

Smith v. Ditech Fin.,
2016 U.S. Dist. LEXIS 164425 (M.D. Pa. Nov. 28, 2016) 69

Smith v. Kohlweiss, Inc.,
2012 U.S. Dist. LEXIS 49119 (N.D. Cal. Mar. 30, 2012) 28

Snyder v. Farnam Cos., Inc.,
792 F. Supp. 2d 712 (D.N.J. 2011) 16

Solorio v. Louisville Ladder, Inc.,
2008 U.S. Dist. LEXIS 30773 (E.D. Wash. Mar. 7, 2008) 26

Song Fi, Inc. v. Google, Inc.,
2016 U.S. Dist. LEXIS 45547 (N.D. Cal. Apr. 4, 2016) 49

South County, Inc. v. First W. Loan Co.,
871 S.W.2d 325 (Ark. 1994) 59

Spaulding v. Wells Fargo Bank, N.A.,
920 F. Supp. 2d 614 (D. Md. 2012) 65

Speier-Roche v. Volkswagen Grp. of Am., Inc.,
2014 U.S. Dist. LEXIS 59991 (S.D. Fla. Apr. 30, 2014) 21, 31, 33

St. Clair v. Kroger Co.,
581 F. Supp. 2d 896 (N.D. Ohio 2008) 24, 25

State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms.,
777 S.E.2d 176 (S.C. 2015) 69

Steele v. Johnson & Johnson,
2015 U.S. Dist. LEXIS 144548 (N.D. Tex. Oct. 23, 2015) 64

Stevenson v. Great Am. Dream, Inc.,
2014 U.S. Dist. LEXIS 95812 (N.D. Ga. July 15, 2014) 19

Stevenson v. Mazda Motor of Am., Inc.,
2015 U.S. Dist. LEXIS 70945 (D.N.J. June 2, 2015) 47

Stires v. Carnival Corp.,
243 F. Supp. 2d 1313 (M.D. Fla. 2002) 65

Suddreth v. Mercedes-Benz, LLC,
2011 U.S. Dist. LEXIS 126237 (D.N.J. Oct. 31, 2011) 29, 30

Sw. Bell Tel. Co. v. FDP Corp.,
811 S.W.2d 572 (Tex. 1991) 38

Taggart v. Wells Fargo Home Mortg., Inc.,
563 F. App'x 889 (3d Cir. 2014) 65

Taragan v. Nissan N. Am., Inc.,
2013 U.S. Dist. LEXIS 87148 (N.D. Cal. June 20, 2013)..................................55

Taterka v. Ford Motor Co.,
271 N.W.2d 653 (Wis. 1978)..22

TD Props. v. VP Bldgs., Inc.,
602 F. Supp. 2d 351 (D. Conn. 2009)..31

TIG Ins. Co. v. James,
184 F. Supp. 2d 591 (S.D. Tex. 2001) 69

Toll Bros., Inc. Twsp. Of Readington,
555 F.3d 131 (3d Cir. 2009) 39

Trail DR, LLC v. Silver Hill Fin., LLC,
2012 U.S. Dist. LEXIS 78953, 21 (E.D. Ark. June 7, 2012) 19

Travelers Indem. Co. v. Cephalon, Inc.,
32 F. Supp. 3d 538 (E.D. Pa. 2014)..15

TRG Night Hawk Ltd. v. Registry Dev. Corp.,
17 So. 3d 782 (Fla. Dist. Ct. App. 2009)..58

Trgo v. Chrysler Corp.,
34 F. Supp. 2d 581 (N.D. Ohio 1998) 61

Troup v. Toyota Motor Corp.,
545 F. App'x. 668 (9th Cir. 2013)..22

Trujillo v. Gomez,
2015 U.S. Dist. LEXIS 51068 (S.D. Cal. Apr. 17, 2015) 14

Tuttle v. Lorillard Tobacco Co.,
118 F. Supp. 2d 954 (D. Minn. 2000)..65

U.S. Bank Nat'l. Assn. v. Pia,
901 N.Y.S.2d 104 (N.Y. App. Div. 2010)..69

U.S. Tire-Tech, Inc. v. Boeran, B.V.,
110 S.W.3d 194 (Tex. Ct. App. 2003)....................24

Ulbrich v. Groth,
78 A.3d 76 (Conn. 2013)....................60

Vista Healthplan, Inc. v. Cephalon, Inc.,
2015 U.S. Dist. LEXIS 74846 (E.D. Pa. June 10, 2015)....................16

Volbers-Klarich v. Middletown Mgmt.,
929 N.E.2d 434 (Ohio 2010)....................77, 78

Volkswagen Grp. of Am., Inc. v. Williams,
64 So. 3d 1062 (Ala. Ct. App. 2010)....................12

Wallis v. Ford Motor Co.,
208 S.W.3d 153 (Ark. 2005)....................70

Walters v. Carson,
2012 U.S. Dist. LEXIS 178473 (D.N.J. Dec. 7, 2012)....................27

Weinstein v. Mortg. Capital Assocs.,
2011 U.S. Dist. LEXIS 2770 (D. Nev. Jan. 11, 2011)....................60

Weisblum v. Prophase Labs, Inc.,
88 F. Supp. 3d 283 (S.D.N.Y. 2015)....................61

Werwinski v. Ford Motor Co.,
286 F.3d 661 (3d Cir. 2002)....................61, 73

Weske v. Samsung Elecs, Am., Inc.,
934 F. Supp. 2d 698 (D.N.J. Mar. 19, 2013)....................22

Westcott v. Wells Fargo Bank, N.A.,
862 F. Supp. 2d 1111 (W.D. Wash. 2012)....................20

White v. Guarente,
372 N.E.2d 315 (N.Y. 1977)....................60

White v. Miss. Order Buyers, Inc.,
648 P.2d 682 (Colo. App. 1982)....................23

White v. Zhou Pei,
452 S.W.3d 527 (Tex. App. 2014)..50

Wilcox v. State Farm Fire & Cas. Co.,
2015 U.S. Dist. LEXIS 26924 (D. Minn. Jan. 15, 2015) 67

Wilkerson v. Nelson,
395 F. Supp. 2d 281 (M.D.N.C. 2005) 20

Williams v. TCF Nat'l Bank,
2013 U.S. Dist. LEXIS 28074 (N.D. Ill. Feb. 26, 2013) 19

Winslow v. Lewis-Shepard, Inc.,
562 A.2d 517 (Conn. 1989) 74

Wiseberg v. Toyota Motor Corp.,
2012 U.S. Dist. LEXIS 45849 (D.N.J. Mar. 30, 2012) (Linares, J.) 52

Xavier v. Philip Morris USA Inc.,
787 F. Supp. 2d 1075 (N.D. Cal. 2011)...33

Yancey v. Remington Arms Co., LLC,
2013 U.S. Dist. LEXIS 140397 (M.D.N.C. Sep. 30, 2013) 28

Yoon v. Yoo,
2016 U.S. Dist. LEXIS 129268 (N.D. Tex. Feb. 24, 2016) 48

Young v. Harbor Motor Works, Inc.,
2008 U.S. Dist. LEXIS 111909 (N.D. Ind. Dec. 18, 2008)................................65

Yurcic v. Purdue Pharma, L.P.,
343 F. Supp. 2d 386 (M.D. Pa. 2004)..26

Zeeman v. Black,
273 S.E.2d 910 (Ga. Ct. App. 1980)...65, 69

Zeigler v. Sony Corp. of Am.,
849 A.2d 19 (Conn. Sup. Ct. 2004) 23, 24

Zigdon v. LVNV Funding, LLC,
2010 U.S. Dist. LEXIS 53813 (N.D. Ohio Apr. 23, 2010) 28

Zlotnick v. Premier Sales Grp., Inc.,
480 F.3d 1281 (11th Cir. 2007) 69

Statutes

9 U.S.C. §2 5

Ark. Code Ann. § 4-88-113(f) 70

Cal. Civ. Code, § 1572 (2) 59

Cal. Com. Code § 2725 34

Colo Rev. Stat. § 6-1-101 *et seq*. 72

Colo. Rev. Stat. § 6-1-105(1)(u) 67

Conn. Gen. Stat. § 42-110g 78

Conn. Gen. Stat. §42a-2-725 34

Conn. Gen. Stat. §42a-2-725(1)-(2) 27

Conn. Gen. Stat. § 52-572m 74, 75

Ga. Code. Ann. § 10-1-373 72

Ga. Code Ann. § 10-1-399 72

Ind. Code § 24-5-0.5-2(8) 67

Indiana Code section 24-5-0.5-3(a) 71

Kan. Stat. Ann. § 50-626 67

Md. Code Ann., Com. Law § 13-301(9) 67

Mich. Comp. Laws Serv. §440.2725 34

Minn. Stat. § 336.2-607 24

Minn. Stat. §336.2-725 34

N.J. Stat. Ann. §12A:2-725 34

N.Y. U.C.C. Law § 2-725 ....27, 34

Nev. Rev. Stat. §104.2607 24

Nev. Rev. Stat. § 598.0923 67

Ohio Rev. Code Ann. §1345.10(c) 79

Ohio Rev. Code §1302.98....................27, 34

Ohio Rev. Code § 1345.09(B) 77

S.C. Code Ann. § 39-5-140[a] 72

Tex. Bus & Com. Code Ann. §2.725....................27, 34

Tex. Bus. & Com. Code § 2.711(a) (West 1967) 38

Tex. Bus. & Com. Code § 2.714, § 2.711....................39

U.C.C. § 2-314 30

Wash. Rev. Code § 62A.2-607 24

Other Authorities

Federal Rules of Evidence Rule 407....................52, 54

Restatement (Second) of Agency § 14(j)....................32

Restatement (Second) of Torts, § 525 (1979)....................41

Rule 8 ....5, 17, 55

Rule 8(a)....................79, 80

Rule 9(b)....................*passim*

Rule 12(b)(1)....................1, 41, 79

Rule 12(b)(6)....................1, 8, 54, 79, 80

Defendant Volkswagen Group of America, Inc. ("VWGoA") respectfully submits this Motion to Dismiss and Memorandum of Law pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 9(b).[1]

PRELIMINARY STATEMENT

This action is, at bottom, an effort to extend the term of the written New Vehicle Limited Warranty ("NVLW")[2] provided with Plaintiffs' vehicles to what Plaintiffs wish to be a "lifetime" warranty. The 36 Plaintiffs, residing in 22 different jurisdictions, are purchasers of Volkswagen and Audi vehicles alleged to have "defective" timing chain systems, which can fail before the end of what

---

1 Defendant Audi of America, Inc. is an operating unit of VWGoA and has no independent corporate existence. Furthermore, pursuant to the Court's Order dated November 22, 2016 (ECF No. 28), Volkswagen AG and Audi AG will respond to the Complaint within 30-days after the completion of service pursuant to the Hague Service Convention, which has not yet occurred.

2 The NVLWs are annexed as Exhibits A-H of the accompanying Declaration of Robert Cameron dated December 5, 2016. The Court may take judicial notice of these documents, which are referenced in the Complaint. *See In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 529 (D.N.J. 2004). New Audi vehicles were warranted for four years or 50,000 miles (whichever occurs first) "for defects in materials and workmanship." VW vehicles were warranted for three years or 36,000 miles (whichever occurs first) for "defects in material and workmanship" (except Plaintiff Oles' 2008 Passat, which was warranted for 4 years or 50,000 miles). The NVLWs for these VW vehicles also contain a powertrain limited warranty for defects in engine components "arising out of defects in materials and/or workmanship" for 5 years or 60,000 miles (whichever occurs first). The NVLWs specifically limit implied warranties to the duration of the express warranty.

Plaintiffs declare is the 120,000 mile "useful life" of the engine. Compl. n.2.[3] No Plaintiff alleges that his or her vehicle experienced any problem with its timing chain system within the applicable warranty period. Compl. ¶ 139. Plaintiffs Stockalper and Melman (Compl. ¶¶ 22-23), in fact, own vehicles which have never experienced such a problem. Plaintiffs' claims thus fly in the face of well-settled law providing that an alleged latent defect manifesting after expiration of an express warranty period is not actionable. *See Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 250 (2d Cir. 1986). As recognized by *Abraham* and the many courts throughout the country that follow it, manufacturers can always be said to have "knowledge regarding the effective life of particular parts and the likelihood of their failing within a particular period of time," and "[a] rule that would make failure of a part actionable based on such 'knowledge' would render meaningless time/mileage limitations in warranty coverage." *Id*.

As a preliminary matter, certain Plaintiffs' claims are barred because the written agreements under which they purchased or leased their vehicles contain binding arbitration and class claim waiver provisions. VWGoA has obtained copies of said agreements relating to nine of the Plaintiffs, whose claims must be dismissed.

---

[3] The putative class vehicles include a number of VW and Audi models from model years 2008 to 2013. Compl. ¶ 6.

Furthermore, as to all Plaintiffs, Plaintiffs do not and cannot allege that VWGoA ever stated that their vehicles, including the timing chains, would not need costly repairs for the "lifetime" of the vehicle. Indeed, the express limited duration of the NVLWs would belie such an assertion. Because no such representation was ever made, Plaintiffs base their claims upon an allegation that "owners…of Class Vehicles were provided owner's manuals and USA Warranty and Maintenance schedules that do not show any timing chain system inspection or maintenance within the first 120,000 miles." Compl. ¶ 8. Plaintiffs thus assert—incredibly—that because the timing chain system, like thousands of other parts, was not mentioned in a maintenance schedule, VWGoA somehow guaranteed that it would last the vehicle's lifetime without a possibility of malfunction. Each of the class vehicles possesses many components that are also not mentioned in the maintenance schedule. It simply does not follow (and a reasonable consumer would not conclude) that VWGoA represented that each of these components would be impervious to wear or malfunction for 120,000 miles.

In addition, the Complaint fails to plead facts sufficient to support a fraudulent omission claim. In an effort to side-step this failure, Plaintiffs rely on design changes, Technical Service Bulletins ("TSBs") and hearsay complaints to NHTSA—which postdate most Plaintiffs' purchases of their vehicles or are otherwise irrelevant to Plaintiffs' claims—to suggest that VWGoA knew of and failed to disclose a defect in the timing chain system. First, Plaintiffs plead no facts as to how the redesign addressed any purported defect and thus fail to demonstrate that a defect exists or existed, let alone that the redesign evinces VWGoA's knowledge of any defect. Additionally, Plaintiffs' gambit is barred by authority rejecting attempts to rely upon the existence of TSBs and NHTSA complaints to establish prior knowledge of an alleged defect, by strong public policy considerations restricting inferences of liability based on subsequent remedial measures and by Plaintiffs' failure to plead facts demonstrating that Defendants received any complaints made to NHTSA at any time relevant to their claims.

In addition to common-law and statutory fraud claims and breach of express and implied warranty claims, the Complaint also asserts claims for breach of contract, negligent misrepresentation, violation of the Magnuson-Moss Warranty Act and unjust enrichment. As demonstrated below, all of the claims, no matter how clothed, are transparent attempts to circumvent the terms of the written warranties. They should be dismissed on this ground alone, and the many other grounds discussed, *infra*.

ARGUMENT

I. LEGAL STANDARD

The legal standards governing this motion are well-settled. In addition to the Rule 8 pleading requirements discussed in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009), Plaintiffs' fraud-based claims are subject to the particularity requirements of Rule 9(b).

II. THOSE CLAIMS INVOLVING CONTRACTS CONTAINING AN ARBITRATION CLAUSE AND CLASS CLAIMS WAIVER MUST BE DISMISSED AND PROMPTLY REFERRED TO ARBITRATION

A. The Governing Legal Standard

The Federal Arbitration Act (FAA) provides that "[a] written provision in any…contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

The United States Supreme Court has repeatedly upheld the enforceability of contractual clauses mandating individual arbitration and precluding class actions or class arbitrations. In *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011)

("*Concepcion*"), the Court stated that the FAA preempts state law which makes specific categories of claims non-arbitrable, and that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* at 341. Subsequent decisions by the Supreme Court emphatically reaffirmed *Concepcion's* strength and broad application. *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2312 n. 5 (2013) (confirming the vitality of *Concepcion* and instructing that "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims"); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (injury and death claims must be arbitrated).

Most recently, in *DirecTV v. Imburgia*, 136 S.Ct. 463 (2015), the Supreme Court held that a California appellate court's invalidation of a mandatory arbitration clause and class action waiver was preempted by the FAA and *Concepcion*. In *DirecTV*, the agreement contained an arbitration clause with a class action waiver, but also provided that "if the law of your state" makes the waiver of class arbitration unenforceable, then the entire arbitration provision was unenforceable. The Supreme Court admonished, "[n]o one denies that lower courts must follow" *Concepcion*. *Id.* at 468. The FAA "is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act.

Consequently, the judges of every State must follow it." *Id.* (emphasis added). Thus, arbitration clauses with class action waivers must be enforced.

B. The Applicable Arbitration Clauses

When they purchased or leased their vehicles, Plaintiffs Hosier, Swihart, Piumarta, Nadiri, Kane, Zielezinski and Ellahie, among others, signed contracts which contain prominently highlighted arbitration clauses with the following or similar language:

> **"ARBITRATION PROVISION**
>
> **"PLEASE REVIEW-IMPORTANT-AFFECTS YOUR LEGAL RIGHTS**
>
> **"1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.**
>
> **"2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS…."**

This clause further provides that it would apply to "Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Provision, and the arbitrability of the claim or dispute)," and includes "third parties who do not sign this contract."

Copies of the relevant sales contracts and the arbitration clauses are annexed as Exhibits A-I of the Declaration of Robert Cameron dated December 8, 2016.

Plaintiff Blanchard's contract has a substantively similar arbitration clause with the exception that it states that it is governed by the law of Florida (*see* Cameron Decl. dated Dec. 8, 2016, ¶12; Ex. H). Plaintiff Smith has a one paragraph arbitration clause with a class action waiver (Cameron Decl. dated Dec. 8, 2016, ¶5; Ex. A). Accordingly, these Plaintiffs must arbitrate their claims as against all Defendants. Jurisdiction to adjudicate the claims in this Court is preempted by the Federal Arbitration Act and authoritative U.S. Supreme Court precedents requiring arbitration.[4]

Because of artful pleading, some of the Plaintiffs have failed to specify from whom they bought or leased their vehicles and the circumstances of the transaction. Further, VWGoA has been unable to obtain copies of sales and lease agreements for some Plaintiffs who allege that they bought new, certified pre-owned or used vehicles from authorized VW or Audi dealers. VWGoA reserves the right to compel arbitration of the remaining Plaintiffs' claims if their sale or lease agreements also contain arbitration clauses.

In any event, section 3 of the FAA provides that issues within the scope of an arbitration agreement shall be referred to arbitration, and that court proceedings

[4] Motions to compel arbitration are reviewed under Rule 12(b)(6) where the affirmative defense of arbitrability of claims is apparent on the face of a complaint or documents relied upon in the complaint. *Sanford v. Bracewell & Guiliani*, 618 Fed. Appx. 114, 117 (3d Cir. 2015).

on other issues shall be stayed. A court may stay the entire action even if some of the parties or issues are not subject to arbitration. *See, e.g.*, *Neal v. Asta Funding, Inc.*, 2013 U.S. Dist. LEXIS 170801, *11-2 (D.N.J. Dec. 4, 2013) (citing cases).

The strong federal policy favoring arbitration requires that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. An order to arbitrate should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." *AT&T Tech., Inc. v. Commcn's Workers of Am.*, 475 U.S. 643, 650 (1986). Plaintiffs' claims here (alleged fraud, breach of contract, negligent misrepresentation, breach of implied and express warranties, unjust enrichment, and violations of various state Consumer Fraud statutes and the Magnuson-Moss Warranty Act) clearly fall within the arbitration clause's broad language of "[a]ny claim or dispute, whether in contract, tort, statute or otherwise," which "arises out of or relates to" the purchase or condition of the vehicle, the contract itself, or "any resulting transaction or relationship".

C. Plaintiffs' Own Pleadings Require This Court To Enforce The Arbitration Clause And Class Action Waiver

It is well settled that factual assertions in pleadings are considered judicial admissions conclusively binding on the party which made them. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S.Ct. 1184, 1197 (2013); *Friedmann v.*

United States, 107 F. Supp. 2d 502, 511 (D.N.J. 2000). As Plaintiffs have asserted (albeit incorrectly) that Defendants were in privity of contract with them and that the dealerships were Defendants' agents and employees, Defendants are entitled to enforce the arbitration clause based on the pleadings. *See*, Compl. ¶ 227-228 ("Every purchase or lease of a Class Vehicle from an authorized dealer of the Class Vehicles constitutes a contract between Defendants and the purchaser or lessee");[5] ¶ 17 (Defendants have marketed, advertised, sold, and/or leased the Class Vehicles within this District through numerous dealers doing business in this District"); ¶142 (Plaintiffs and members of the Classes relied upon material misrepresentations, fraudulent statements and/or material omissions of employees and agents of Defendants at the time of purchase or lease.") New Jersey law recognizes that arbitration may be compelled by a non-signatory against a signatory to a contract on the basis of agency principles. *Hirsch v. Amper Financial Services, LLC,* 71 A.3d 849, 859 (N.J. 2013).[6]

---

[5] As discussed *infra*, Defendants were not in privity with Plaintiffs. However, for purposes of a motion to compel arbitration, the Court will focus on the arbitration clause and the allegations in the Complaint, and accept the allegations in the Complaint as true (*see, e.g.*, *CardioNet, Inc. v. Cigna Health Corp.*, 751 F.3d 165, 168 (3d Cir. 2014) (in determining motion to compel arbitration, the Court will accept as true the factual allegations set forth in the Complaint and may consider the substance of the contracts compelling arbitration); *Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1, 17-23 (1st Cir. 2014) (involving motion to compel brought by non-signatory); *Henderson v. Legal Helpers Debt Resolution, LLC*, 486 B.R. 343, 349 (Bankr. S.D. Miss. 2013) (accepting the factual allegations of the complaint as true for purposes of deciding motion to compel arbitration).

Moreover, the arbitration clauses here directly incorporate third parties. It covers any dispute which arises out of, *inter alia*, "any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract)." Defendants are plainly covered by this clause of the arbitration agreements, since Plaintiffs plead that their purported relationship with Plaintiffs arose out of Plaintiffs' execution of sales and lease contracts for their vehicles. Absent those contracts, Plaintiffs would not have purchased or leased the vehicles and, as such, would not have their alleged relationship to Defendants.

The arbitration agreement specifically provides that all issues of arbitrability are to be referred to the arbitrator ("Any claim or dispute…including the interpretation and scope of this Arbitration Provision, and the arbitrability of the claim or dispute" is to be "resolved by neutral, binding arbitration and not by a court action…."). As Plaintiffs have pleaded that Defendants were party to the contracts, and Plaintiffs have clearly and unmistakably agreed that arbitrability is a matter for the arbitrator, any issues of arbitrability must be referred to the arbitrator.

6 Defendants deny the existence of an agency relationship as postulated by Plaintiffs. However, as discussed *supra*, the allegations in the Complaint are taken as true for purposes of a motion to compel arbitration. *See, e.g., Cardionet, Inc.*, 751 F.3d at 168.

D. In Addition, Non-Signatory Defendants Generally Can Enforce Arbitration Clauses Under The Doctrine Of Equitable Estoppel

The Supreme Court held in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009) that a non-signatory to an arbitration agreement may enforce an arbitration clause under the FAA if the relevant state contract law would permit it. Among the state law doctrines which the Supreme Court has recognized as permitting enforcement of arbitration clauses by non-signatories are equitable estoppel and third-party beneficiary status. *Id.* at 631-32.

Courts have held that non-signatory automobile manufacturers and distributors may enforce the arbitration clause in a dealership purchase agreement under the doctrine of equitable estoppel. *See, e.g.*, *Ford Motor Co. v. Ables*, 207 Fed. App'x 443, 448 (5th Cir. 2006); *Mance v. Mercedes-Benz USA*, 901 F. Supp. 2d 1147, 1155-56 (N.D. Cal. Sep. 28, 2012); *Lau v. Mercedes-Benz USA, LLC*, 2012 U.S. Dist. LEXIS 11358, *9-12 (N.D. Cal. Jan. 31, 2012); *Agnew v. Honda Motor Co.*, 2009 U.S. Dist. LEXIS 53914, *12 (S.D. Ind. May 20, 2009); *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1018 (M.D. Ala. 1997); *Volkswagen Grp. of Am., Inc. v. Williams*, 64 So. 3d 1062, 1067 (Ala. Ct. App. 2010).

Many of the relevant jurisdictions in which Plaintiffs bought their vehicles apply two independent bases for the application of equitable estoppel, each of which is abundantly present here: (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the non-signatory; or (2) when the signatory raises allegations of substantially interdependent and concerted misconduct by both a non-signatory and one or more signatories to the contract, or a similar test. *See, e.g.*, *Goldman v. KPMG, LLP*, 92 Cal. Rptr. 3d 534, 544 (Cal. Ct. App. 2009); *Berger v. Accounting Fulfillment Servs. LLC*, 2016 U.S. Dist. LEXIS 88782, at *12 (M.D. Fla. July 8, 2016) (where plaintiffs' complaint failed to distinguish between non-signatory defendant and signatory but referred to "Defendants" generally throughout the complaint, application of equitable estoppel was warranted because plaintiffs had alleged substantially interdependent and concerted misconduct by both the non-signatory and one of the signatories to the contract); *Great N. Ins. Co. v. Cornerstone Custom Home Builders*, 2016 U.S. Dist. LEXIS 94344, *3 (M.D. Ga. July 20, 2016); *Elder v. BMO Harris Bank*, 2014 U.S. Dist. LEXIS 50194, *5-6 (D. Md. Apr. 11, 2014); *Ahlers v. Ryland Homes Nev. LLC*, 2010 Nev. Unpub. LEXIS 209, *4-5 (Nev. Apr. 16, 2010) (arbitration compelled where plaintiff relied on contract as basis for relief); *cf. Rachal v. Reitz*, 403 S.W.3d 840, 846 (Tex. 2013) ("direct benefits estoppel" test applicable in Texas).

Here, as shown above, Defendants have a right to compel Plaintiffs to arbitrate their claims because those claims necessarily depend upon the existence of the underlying sales or lease contracts with the arbitration clause and class action waiver to which Plaintiffs agreed to be bound. The purchase or lease of a

VW or Audi vehicle is a *prima facie* element of Plaintiffs' claims and damage theories.

Additionally, since Plaintiffs have also asserted allegations of substantially interdependent and concerted misconduct by Defendants and the signatory dealerships, *see* Compl. ¶¶ 17, 142-43, 227-28, Plaintiffs are equitably estopped from seeking to avoid arbitration. It would be unfair to allow Plaintiffs to rely upon the signing of the contracts for their standing to assert their claims against Defendants while at the same time evading enforcement of the arbitration clauses. Courts do not allow parties to rely upon a contract when it works to their advantage and then repudiate it when it works to their disadvantage.

It is well settled that a third-party beneficiary of a contract may have the right to enforce an arbitration provision, even though the beneficiary is not a party to the contract. *See, e.g.*, *Trujillo v. Gomez*, 2015 U.S. Dist. LEXIS 51068, *12-13 (S.D. Cal. Apr. 17, 2015); *Amat v. Rey Pizza Corp.*, 2016 U.S. Dist. LEXIS 125054, *9-10 (S.D. Fla. July 6, 2016); *Akpele v. Pac. Life Ins. Co.*, 646 Fed Appx. 908, 912-13 (11th Cir. 2016) (Georgia law); *Elder v. BMO Harris Bank*, 2014 U.S. Dist. LEXIS 50194, *4 (D. Md. Apr. 11, 2014); *Carter v. Wynn Las Vegas*, 2011 U.S. Dist. LEXIS 76528, *6 (D. Nev. July 14, 2011); *Sabines Syngas, Ltd. v. Port of Port Arthur*, 2011 Tex. App. LEXIS 228, *12 (Tex. App. 2011). Plaintiffs have conclusorily pleaded that Defendants and the dealerships are effectively one and the same and have the same interests. *See*, *e.g.*, Compl. ¶ 228 ("Every purchase or lease of a Class Vehicle from an authorized dealer of the Class Vehicles constitutes a contract between Defendants and the purchaser or lessee"). Thus, Plaintiffs should be compelled to submit to arbitration.

III. PLAINTIFFS' COMMON LAW CLAIMS MUST BE DISMISSED FOR FAILURE TO PLEAD THE APPLICABLE LAW

A. The Failure to Plead Which State's Law Applies Mandates the Dismissal of Plaintiffs' Common Law Claims

Plaintiffs assert common-law claims for fraud, breach of contract, negligent misrepresentation, and unjust enrichment without specifying which jurisdiction's law applies. The failure to specify the applicable law renders these claims vague, deprives defendants of the ability to effectively respond, and, as courts within this Circuit have acknowledged, deprives courts of the ability to efficiently analyze claims, requiring dismissal. *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 167 (E.D. Pa. 2009) (dismissing unjust enrichment claim where applicable law was not specified and declining to "struggle[] to derive" the general elements of the claim by performing a state-by-state survey); *Travelers Indem. Co. v. Cephalon, Inc.*, 32 F. Supp. 3d 538, 550 n.15 (E.D. Pa. 2014); *see also Hines v. Overstock.com, Inc.*, 2013 U.S. Dist. LEXIS 117141, *33-35 (E.D.N.Y. Aug. 19, 2013) (same); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.

Supp. 2d 896, 910 (N.D. Cal. 2008) (same). For this reason alone, Plaintiffs' common law claims should be dismissed.

B. The Law of Each Plaintiff's Home State Governs

If the Court does not dismiss for failure to plead the governing law, the Court must determine which possibly applicable law should apply to each Plaintiff's claims. A federal court with diversity jurisdiction must apply the choice of law principles of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). New Jersey applies the "most significant relationship" test. *P.V. ex. rel. T.V. v. Camp Jaycee*, 197 N.J. 132, 142-43 (2008). Under this test, the Court first determines whether there is a conflict between the substantive law of the forum and the law of the competing forum with regard to each cause of action. If a conflict exists, the Court is required to determine which state has the "most significant relationship" to the claim by "weighing the factors set forth in the Restatement section corresponding to the plaintiff's cause of action." *Snyder v. Farnam Cos., Inc.*, 792 F. Supp. 2d 712, 717 (D.N.J. 2011). Here, variations and conflicts among common law doctrines and warranty laws as well as the consumer fraud statutes exist among the various states. *See, e.g.*, *Vista Healthplan, Inc. v. Cephalon, Inc.*, 2015 U.S. Dist. LEXIS 74846 (E.D. Pa. June 10, 2015); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 350-51 (D.N.J. 1997). Under New Jersey's "most significant relationship" test, each Plaintiff's home state clearly has the "most significant relationship" to and governs Plaintiffs' claims. *Maniscalo v. Brother Int'l (USA) Corp.*, 709 F.3d 202, 206 (3d Cir. 2013); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D at 350-51.[7]

IV. LUMPING REQUIRES DISMISSAL OF ALL PLAINTIFFS' CLAIMS

Plaintiffs' Complaint combines separate named defendant entities together under the name "Defendants," including Volkswagen AG ("VWAG"), Audi AG, and VWGoA, without differentiating between these entities. None of Plaintiffs' allegations distinguish between VWGoA, VWAG or Audi AG. Rather, the Complaint attributes all alleged acts and conduct to "Defendants" generally, without specifying which individual Defendant is responsible for each act. Lumping multiple defendants together like this requires dismissal under Rules 8 and 9(b). *MDNet, Inc. v. Pharmacia Corp.*, 147 F. App'x 239, 245 (3d Cir. 2005) ("When multiple defendants are involved, the complaint must be plead with particularity by specifying the allegations of fraud applying to each defendant."); *Galicki v. New Jersey*,2015 U.S. Dist. LEXIS 84365, *11 (D.N.J. June 29, 2015) (Linares, J.) (Rule 8 not satisfied where a complaint "lump[ed] all Defendants together, failing to put Defendants on notice of their own alleged wrongdoing").

---

[7] For purposes of this analysis, we assume (though the majority of Plaintiffs do not plead) that Plaintiffs purchased their class vehicles in their home states and that their home states were therefore the states in which misrepresentations and omissions were allegedly received.

V. THE EXPRESS WARRANTY CLAIMS SHOULD BE DISMISSED

A. No Claim Lies For Repairs Or Failure Outside The Warranty Period

Plaintiffs' breach of express warranty claims are premised upon the written NVLWs applicable to each of their vehicles. No Plaintiff has alleged that his/her vehicle experienced a timing chain failure during the duration of the applicable express warranty period. Plaintiffs' express warranty claims must be dismissed because latent defects discovered after the expiration of the warranty period are not actionable. *See, e.g., Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 616 (3d Cir. 1995) ("an express warranty does not cover repairs made after the applicable time…has elapsed"); *Alban v. BMW of N. Am., LLC*, 2010 U.S. Dist. LEXIS 94038, *25 (D.N.J. Sep. 8, 2010). Here, the Complaint fails to plead that Plaintiffs sought warranty repairs, or that the timing chain system failed in any vehicle, within the duration of the express warranty period.[8] *See* Compl. ¶¶ 139; *McQueen v. BMW of N. Am., LLC*, 2014 U.S. Dist. LEXIS 21084, *17-18 (D.N.J. Feb. 20, 2014) (dismissing warranty claim because "the FAC did not plead that the alleged defect had manifested itself within the terms of BMW's four year/50,000 mile warranty").

[8] Plaintiffs Stockalper and Melman have failed to assert that they ever experienced a timing chain failure, let alone within the warranty period. *See* Compl. ¶ 22-25.

Plaintiffs cannot circumvent the time and mileage limitations of the express warranties by claiming Defendants "knew" the subject vehicles had an alleged defect that would not manifest during the warranty period. *See Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 250 (2d Cir. 1986).[9]

B. The Time/Mileage Terms of the NVLWS Are Not Unconscionable

Plaintiffs cannot evade the express warranty's time and mileage limitations by labeling them "unconscionable." Compl. ¶ 256. In most relevant states, a contract or clause is unconscionable only if it is *both* procedurally and substantively unconscionable.[10] Plaintiffs fail sufficiently to allege either here. To determine procedural unconscionability, courts look to the circumstances surrounding the transaction, such as plaintiff's ability to understand the terms of the contract and the existence of a meaningful choice at the time of contracting. *See* n.10, *supra*. Plaintiffs' warranties are not procedurally unconscionable. Plaintiffs do not and cannot allege that they lacked meaningful choices as to brand, year, make, model, and warranties of vehicles available for purchase, or that they were deprived of the opportunity to understand the warranty terms for the vehicles they purchased or leased. *See Alban*, 2011 U.S. Dist. LEXIS 26754, *27 (D.N.J. Mar. 15, 2011) (alleged lack of "meaningful choice in determining the time and mileage limitation" and "gross disparity in bargaining power" are mere conclusions "not entitled to the assumption of truth"); *Marchante v. Sony Corp. of Am.*, 801 F. Supp. 2d 1013, 1022-23 (S.D. Cal. July 8, 2011); *Anonymous v. JP Morgan Chase & Co.*, 2005 U.S. Dist. LEXIS 26083, *17 (S.D.N.Y. Oct. 29,

---

[9] *See also Licul v. Volkswagen Group of Am.*, 2013 U.S. Dist. LEXIS 171627, at *6 (S.D. Fla. Dec. 5, 2013); *Moulton v. LG Elec., Inc.*, 2012 U.S. Dist. LEXIS 162389, *5-6 (D.N.J. Nov. 14, 2012) (Linares, J.); *Daugherty v. American Honda Motor Co.*, 144 Cal. App. 4th 824, 830 (2006).

[10] *Trail DR, LLC v. Silver Hill Fin., LLC*, 2012 U.S. Dist. LEXIS 78953, *21 (E.D. Ark. June 7, 2012); *Aron v. U-Haul Co. of Cal.*, 143 Cal. App. 4th 796, 808 (2006); *Am. Family Mut. Ins. Co. v. TAMKO Bldg. Prods.*, 2016 U.S. Dist. LEXIS 50408, *11 (D. Colo. Apr. 13, 2016); *Bender v. Bender*, 292 Conn. 696, 732 (2009); *Licul v. Volkswagen Grp. of Am.*, 2013 U.S. Dist. LEXIS 171627, *7-9 (S.D. Fla. Dec. 5, 2013); *Stevenson v. Great Am. Dream, Inc.*, 2014 U.S. Dist. LEXIS 95812, *3-4 (N.D. Ga. July 15, 2014); *Williams v. TCF Nat'l Bank*, 2013 U.S. Dist. LEXIS 28074, *17 (N.D. Ill. Feb. 26, 2013); *Sedelnikova v. Cheesecake Factory Rest. Inc.*, 2010 U.S. Dist. LEXIS 56211, *17-18 (D. Md. June 7, 2010); *Popham v. Keystone RV Co.*, 2016 U.S. Dist. LEXIS 127093, *18-19 (N.D. Ind. Sep. 19, 2016); *Knopke v. Ford Motor Co.*, 2014 U.S. Dist. LEXIS 158928, *12-13 (D. Kan. Nov. 10, 2014); *Plymouth Pointe Condo. Ass'n v. Delcor Homes-Plymouth Pointe*, 2003 Mich. App. LEXIS 2742, *8-9 (Mich. Ct. App. Oct. 28, 2003); *Lucre, Inc. v. ADC Telcoms.*, 2002 U.S. Dist. LEXIS 15421, *11-12 (W.D. Mich. Aug. 16, 2002) (applying Minnesota law); *Bourne v. Stewart Title Guaranty Co.*, 2011 U.S. Dist. LEXIS 16202, *15 (D.N.H. Feb. 16, 2011); *Alban v. BMW of N. Am.*, 2011 U.S. Dist. LEXIS 26754, *25 (D.N.J. Mar. 15, 2011); *Deutsche Bank*

Nat'l Tr. Co., v. Lacapria, 2010 U.S. Dist. LEXIS 17998, *19 (D.N.J. Mar. 1, 2010); *Nayal v. HIP Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566, 571 (S.D.N.Y. 2009); *Hawkins v. O'Brien*, 2009 Ohio App. LEXIS 73 (Jan. 9, 2009); *Okada v. Nev. Prop. 1 LLC*, 2015 U.S. Dist. LEXIS 124227, *4-5 (D. Nev. Sep. 17, 2015); *Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 289 (M.D.N.C. 2005); *Korea Week, Inc. v. GOT Capital, LLC*, 2016 U.S. Dist. LEXIS 69646, *26 (E.D. Pa. May 27, 2016); *Am. Contrs. Indem. Co. v. Carolina Realty & Dev. Co.*, 2012 U.S. Dist. LEXIS 97383, *21 (D.S.C. Mar. 12, 2012), *rejected on other grounds by*, 2012 U.S. Dist. LEXIS 94071 (D.S.C. July 9, 2012); *Garcia v. Universal Mortg. Corp.*, 2013 U.S. Dist. LEXIS 63445, *29-30 (N.D. Tex. May 3, 2013); *Westcott v. Wells Fargo Bank, N.A.*, 862 F. Supp. 2d 1111, 1120 (W.D. Wash. 2012).

2005) (The fact "that the Cardmember Agreement is a printed form and is offered on a take-it-or-leave-it basis…is insufficient to render the contract unconscionable, particularly when the plaintiff had the ability to go to other sources of credit."); *Plymouth Pointe Condo. Ass'n v. Delcor Homes-Plymouth Pointe*, 2003 Mich. App. LEXIS 2742, *10 (Ct. App. Oct. 28, 2003). Moreover, Plaintiffs who failed to allege that they purchased their vehicles from authorized dealers cannot hypothesize about the circumstances surrounding the negotiation and execution of the original contract or the parties' relative bargaining positions.[11] *See, e.g.*, *O'Berry v. Gray*, 510 So. 2d 1135, 1137 (Fla. Dist. Ct. 1987) (no procedural unconscionability where there is "no evidence of the circumstances surrounding the parties' execution of the original agreement").

A contract is substantively unconscionable only if its terms are so unfair that they "shock the court's conscience." *Alban*, 2011 U.S. Dist. LEXIS 26754, at *25; *see also* n.10, *supra*. The warranty durations for Plaintiffs' vehicles meet or exceed similar warranties enforced by courts throughout the country, including this Court. *See, e.g.*, *Speier-Roche*, 2014 U.S. Dist. LEXIS 59991, *11 (enforcing vehicle's 12 month/12,000 mile warranty); *Alban*, 2011 U.S. Dist. LEXIS 26754, at *28 (D.N.J. Mar. 15, 2011); *Licul*, 2013 U.S. Dist. LEXIS 171627,*8 (2-

---

[11] These Plaintiffs are Stockalper, Melman, LeMoine, Lopez, Mekbeb, Johnson, Noyes, Deib, Schaffranek, and Gossman.

year/24,000 mile warranty not unconscionable); *Taterka v. Ford Motor Co.*, 271 N.W.2d 653, 657 (Wis. 1978) (12-months/12,000 miles upheld).

Plaintiffs' allegation of knowledge prior to sale is similarly unavailing. *See e.g., Weske v. Samsung Elecs, Am., Inc.*, 934 F. Supp. 2d 698, 705 (D.N.J. Mar. 19, 2013); *Licul*, 2013 U.S. Dist. LEXIS 171627, *9; *Alban*, 2011 U.S. Dist. LEXIS 26754, *27-29.

C. Plaintiffs' NVLWS Do Not Cover Design Defects, Which Constitute the Gravamen of Plaintiffs' Claims

The NVLWs applicable to Plaintiffs' vehicles cover only repairs to correct "*a manufacturer's defect in material and workmanship*." *See, e.g.*, Cameron Decl. dated Dec. 5, 2016, Ex. A at 2; *see also* Exs. B-H. Courts around the country have recognized that such language does not cover purported design defects. *See Troup v. Toyota Motor Corp.*, 545 F. App'x. 668, 668 (9th Cir. 2013) ("The Toyota Prius's alleged design defect does not fall within the scope of Toyota's Basic Warranty against 'defects in materials or workmanship,'" as "express warranties covering defects in materials and workmanship exclude defects in design."); *Bruce Martin Constr. v. CTB, Inc.*, 735 F.3d 750, 754 (8th Cir. 2013) ("a design defect cannot also be a defect in material and workmanship"); *Mack Trucks, Inc. v. Borgwarner Turbo Sys.*, 508 F. App'x. 180, 184 (3d Cir. 2012); *Nelson v. Nissan N. Am. Inc.*, 2014 U.S. Dist. LEXIS 175222, *9 (D.N.J. Dec. 19, 2014); *Cali v. Chrysler Gp. LLC*, 2011 U.S. Dist. LEXIS 5220, *6-7 (S.D.N.Y. Jan. 18, 2011).

Here, Plaintiffs' Complaint repeatedly states that the alleged defect relates to *design*, and not any manufacturing mishap. *See e.g.*,¶ 100, 126-30. Further, Plaintiffs' allegations that the purported timing chain system defect existed in every putative class vehicle is necessarily a design defect claim not covered under the express terms of the applicable NVLWs. Compl. ¶ 6*; see Nelson*, 2014 U.S. Dist. LEXIS 175222, *8; *Gertz v. Toyota Motor Corp.*, 2011 U.S. Dist. LEXIS 94183, *10-11 (C.D. Cal. Aug. 22, 2011). Accordingly, the claim for breach of express warranty premised on the NVLWs must be dismissed.

D. Plaintiffs Have Not Pled Facts Demonstrating Their Compliance with Warranty Notice Requirements

Arkansas, California, Colorado, Connecticut,[12] Florida, Georgia, Illinois, Indiana, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, and Washington warranty law requires plaintiffs to provide Defendants with formal pre-suit notice of any alleged defects. Here, no Plaintiff from any of these states pleads compliance with this requirement. Accordingly, the warranty claims of all Plaintiffs other than Kansas Plaintiff Mody must be dismissed.[13]

---

[12] Although Plaintiff Molwitz asserts that he contacted VWGoA requesting free repairs, the Complaint fails to allege that Molwitz informed VWGoA that "the alleged defects constituted a breach of warranty." *Zeigler v. Sony Corp. of Am.*, 849 A.2d 19, 24 (Conn. Sup. Ct. 2004).

[13] *Cotner v. Int'l Harvester Co.*, 260 Ark. 885, 889 (1977); *Park-Kim v. Daikin Indus.*, 2016 U.S. Dist. LEXIS 104248, *61-62 (C.D. Cal. Aug. 3, 2016); *White v.*

Plaintiffs' allegation that Defendants were provided the requisite notice through complaints to NHTSA and to "authorized dealers nationwide" (Compl. ¶ 255) does not satisfy the statutory notice requirement. The UCC's notice requirement is satisfied only where the defendant is formally notified of a problem with a *particular product purchased by a particular buyer*. As Judge Learned Hand so aptly stated regarding section 2-607's predecessor:

> The notice of the breach required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of ***buyer's claim*** that they constitute a breach.

Miss. Order Buyers, Inc., 648 P.2d 682, 684 (Colo. App. 1982); *Zeigler v. Sony Corp. of Am.*, 849 A.2d 19, 24 (Conn. Super. Ct. 2004); *Garcia v. Clarins USA, Inc.*, 2014 U.S. Dist. LEXIS 182426, *18-19 (S.D. Fla. Sep. 4, 2014); *Garcia v. Chrysler Corp.*, 127 F. Supp. 3d 212, 225 (S.D.N.Y. 2015) (applying Georgia law); *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 494 (1996); *Jasper v. Abbott Labs., Inc.*, 834 F. Supp. 2d 766, 774 (N.D. Ill. 2011) (applying Indiana law); *Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 542 (D. Md. Aug. 25, 2011); *Rosipko v. FCA US, LLC*, 2015 U.S. Dist. LEXIS 163455, *16 (E.D. Mich. Dec. 7, 2015); Minn. Stat. § 336.2-607; Nev. Rev. Stat. §104.2607; *Herne v. Cooper Indus.*, 2005 U.S. Dist. LEXIS 24371, *16 (D.N.H. Oct. 19, 2005); *Hammer v. Vital Pharms., Inc.*, 2012 U.S. Dist. LEXIS 40632, *30 (D.N.J. Mar. 26, 2012); *Beautiful Home Textiles (USA) v. Burlington Coat Factory Warehouse Corp.*, 2014 U.S. Dist. LEXIS 114010, *30 (S.D.N.Y. Aug. 15, 2014); *Sani-Pure Food Labs., LLC v. Biomerieux, Inc.*, 2014 U.S. Dist. LEXIS 160536, *14 (D.N.J. Nov. 13, 2014) (applying North Carolina law); *St. Clair v. Kroger Co.*, 581 F. Supp. 2d 896, 902 (N.D. Ohio 2008); *AFSCME v. Ortho-McNeil Janssen Pharms., Inc.*, 2010 U.S. Dist. LEXIS 23181, *19 (E.D. Pa. Mar. 11, 2010); *Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 542-43 (D. Md. Aug. 25, 2011) (applying South Carolina law); *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 199 (Tex. Ct. App. 2003); Wash. Rev. Code § 62A.2-607.

Am. Mfg. Co. v. United States Shipping Bd. Emergency Fleet Corp., 7 F.2d 565, 566 (2d Cir. 1925) (emphasis added); *see also Aqualon Co. v. Mac Equip., Inc.*, 149 F.3d 262, 266-67 (4th Cir. 1998); *Garcia v. Chrysler Grp. LLC*, 127 F. Supp. 3d 212 (S.D.N.Y. Sep. 1, 2015); *In re: Shop-Vac Mktg. & Sales Practices Litig.*, 964 F. Supp. 2d 355, 364 (M.D. Pa. 2013); *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 494 (1996); *St. Clair v. Kroger Co.*, 581 F. Supp. 2d 896, 902 (N.D. Ohio 2008); *Cotner v. Int'l Harvester Co.*, 260 Ark. 885, 889 (1977).

E. Plaintiffs Have Not Sufficiently Alleged That Any Warranty Was Part of the Basis of Their Bargain

The express warranty claims of Plaintiffs who failed to allege they purchased their vehicles from authorized dealers,[14] and the claims of all Plaintiffs premised on alleged representations that the subject vehicles are "safe, built to last, and reliable," Compl. ¶ 242,[15] further fail because the Complaint does not allege facts establishing that the warranty became part of the "basis of the bargain" between the buyer and Defendant. The complaint, which contains only a formulaic allegation that "Defendants' warranties formed a basis of the bargain that was reached when Plaintiff . . . purchased or leased their Class Vehicles" (Compl. ¶

---

14 Plaintiffs Stockalper, Melman, LeMoine, Lopez, Mekbeb, Johnson, Noyes, Deib, Schaffranek, and Gossman.

15 The representations regarding "safe, built to last, and reliable" also fail as they constitute 'mere puffery' insufficient to sustain a claim. *In re Toshiba Am. HD DVD Mktg. & Sales Practices Litig.*, 2009 U.S. Dist. LEXIS 82833, *49 (D.N.J. Sep. 10, 2009).

247), pleads no facts demonstrating that (or how) Plaintiffs relied on, or even saw or read, the alleged warranties prior to purchasing or leasing their vehicles. Depending on the state, "basis of the bargain" means that plaintiffs must have relied on or at least seen the subject warranty prior to purchasing their vehicles, *i.e.*, without reliance or the particular state equivalent, no express warranty claim is viable in any of the states at issue.[16] The warranty claim must therefore be

[16] *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 447 (1992); *Leonhart v. Nature's Path Foods, Inc.*, 2014 U.S. Dist. LEXIS 164425, *25 (N.D. Cal. Nov. 21, 2014) (to plead an express warranty claim, a plaintiff must assert "the exact terms of the warranty [and] plaintiff's reasonable reliance thereon"); *Assocs. of San Lazaro v. San Lazaro Park Props.*, 864 P.2d 111, 115 (Colo. 1993); *Criteria II v. Co-Opportunity Precision Wood Prods.*, 2001 Conn. Super. LEXIS 2548, *2 (Super. Ct. Aug. 30, 2001); *Hobco, Inc. v. Tallahassee Assoc.*, 807 F.2d 1529, 1533 (11th Cir. 1987) (Florida law) ("an express warranty may arise only where justifiable reliance upon assertions or affirmations is part of the basis of the bargain"); *Hrosik v. J. Keim Builders*, 345 N.E.2d 514, 515 (Ill. App. Ct. 1976); *Ryden v. Tomberlin Auto. Grp.*,2012 U.S. Dist. LEXIS 139212, *6 (S.D. Ind. Sep. 27, 2012); *Reed v. Sears, Roebuck & Co.*, 934 F. Supp. 713, 720 n.7 (D. Md. 1996); *Baye v. HBI Branded Apparel Enters.*, 2013 U.S. Dist. LEXIS 174599, *15 (E.D. Mich. Dec. 13, 2013); *Hendricks v. Callahan*, 972 F.2d 190, 193 (8th Cir. 1992) (applying Minnesota law); *Industrial Graphics, Inc. v. Asahi Corp.*, 485 F. Supp. 793, 797 n.3 (D. Minn. 1980); *Allied Fidelity Ins. Co. v. Pico*, 99 Nev. 15, 17-18 (1983); *Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 844-45 (2005); *Eberhart v. LG Elecs. USA, Inc.*, 2015 U.S. Dist. LEXIS 173073, *17-18 (D.N.J. Dec. 30, 2015); *Horowitz v. Stryker Corp.*, 613 F. Supp. 2d 271, 286 (E.D.N.Y. 2009); *Cavanagh v. Ford Motor Co.*, 2014 U.S. Dist. LEXIS 68504, *12 (E.D.N.Y. May 19, 2014); *Maxwell v. Remington Arms Co., LLC*, 2014 U.S. Dist. LEXIS 158153, *10 (M.D.N.C. Nov. 7, 2014); *Price Bros. Co. v. Phila. Gear Corp.*,649 F.2d 416, 422 (6th Cir. 1981) (applying Ohio law); *Yurcic v. Purdue Pharma, L.P.*, 343 F. Supp. 2d 386, 394 (M.D. Pa. 2004); *Odom v. Ford Motor Co.*, 95 S.E.2d 601, 605 (S.C. 1956); *Gedalia v. Whole Foods Mkt. Servs., Inc.*, 53 F. Supp. 3d 943, 960 (S.D. Tex. Sep. 30, 2014); *Solorio v. Louisville Ladder, Inc.*, 2008 U.S. Dist. LEXIS 30773, *11 (E.D. Wash. Mar. 7, 2008).

dismissed. *See Walters v. Carson*, 2012 U.S. Dist. LEXIS 178473, *9 (D.N.J. Dec. 7, 2012) (dismissing express warranty claim because "nowhere does Plaintiff allege how that alleged warranty formed any part of the basis of his decision to purchase the product").

F. Certain Of Plaintiffs' Breach Of Express Warranty Claims Are Barred By The Statute Of Limitations

Connecticut, New York, Ohio and Texas impose a four-year statute of limitations on breach of warranty claims, running from the date of delivery, with no discovery rule, except where a warranty explicitly extends to future performance. *See, e.g.*, Conn. Gen. Stat. §42a-2-725(1)-(2); N.Y. U.C.C. Law § 2-725; Ohio Rev. Code §1302.98; Tex. Bus & Com. Code Ann. §2.725. In these jurisdictions, a repair and replace warranty, as in this case, is not deemed to be a warranty explicitly extending to future performance. *See, e.g.*, *Collins v. A-1 Auto Service, Inc.*, 2013 Conn. Super. LEXIS 120 (Super. Ct. 2013); *Brainard v. Freightliner Corp.*, 2002 U.S. Dist. LEXIS 18617 (W.D.N.Y. Oct. 1, 2002); *Robins v. Chrysler Group LLC*, 2015 Ohio Misc. LEXIS 21929 (Ohio Ct. Com. Pl. Jan 12, 2015); *Muss v. Mercedes-Benz of N. Am., Inc.*, 734 S.W.2d 155 (Tex. App. 1987).

Plaintiffs Gaudet (CT), Molwitz (CT), Melman (NY), and Kane (TX) purchased their vehicles on January 1, 2011 (Compl. ¶ 59), November 6, 2009 (Compl. ¶ 56), November 18, 2009 (Compl. ¶ 24), and in 2009 (Compl. ¶ 54), respectively. Although the Complaint is silent as to when Plaintiffs Serbia (CT) and Scott (OH) purchased their vehicles, VWGoA's records show that they were purchased on August 16, 2011 (*see* Cameron Decl. dated Dec. 5, 2016, Ex. I) and April 28, 2011 (*see id*., Ex. J), respectively. Thus, the claims of Gaudet, Molwitz, Melman, Kane, Serbia and Scott for breach of express warranty, which were commenced more than four years after purchase of their vehicles, are time-barred by the four-year statute of limitations.[17]

Plaintiffs cannot avoid the statute of limitations by conclusorily pleading that it was tolled by fraudulent concealment of a defect. Rule 9(b) requires plaintiffs to plead particularized facts—the "who, what, when, where and how"—demonstrating that active fraudulent conduct by defendants caused them to delay bringing suit within the applicable limitations period. *See Smith v. Kohlweiss, Inc.*, 2012 U.S. Dist. LEXIS 49119, at *16 (N.D. Cal. Mar. 30, 2012); *Justice v. Rheem Mfg. Co.*, 2014 U.S. Dist. LEXIS 179128, at *20 (S.D. Fla. Aug. 21, 2014); *Bausch v. Philatelic Leasing*, 1994 U.S. App. LEXIS 22289, at *21-22 (4th Cir. Aug. 19, 1994); *Butala v. Agashiwala*, 916 F. Supp. 314, 319 (S.D.N.Y. 1996); *Yancey v. Remington Arms Co., LLC*, 2013 U.S. Dist. LEXIS 140397, at *20 (M.D.N.C. Sep. 30, 2013); *Zigdon v. LVNV Funding, LLC*, 2010 U.S. Dist. LEXIS

---

[17] Even under the five-year powertrain warranty applicable to Volkswagen, Plaintiffs claims would be time-barred since the Complaint was filed on August 22, 2016.

53813, at *25 (N.D. Ohio Apr. 23, 2010). Here, Plaintiffs' conclusory allegations that the statutes of limitations have been tolled because "[t]he defendants fraudulently attributed the Timing Chain System failures to other factors and/or exculpating conditions for which Defendants had no responsibility" and/or engaged in a "secret repair" program (Compl. ¶¶ 201 & 364) are insufficient to satisfy Rule 9(b). The Complaint nowhere identifies agents of VWGoA who made such representations and does not specify when, where, or to whom these representations were made, let alone identify who performed any so-called secret repairs, or when, where or how. Accordingly, Plaintiffs have failed to plead facts sufficient to toll the statutes of limitations applicable to their claims.

VI. PLAINTIFFS' IMPLIED WARRANTY OF MERCHANTABILITY CLAIMS MUST BE DISMISSED

A. The Implied Warranties Expired Before the Alleged Defect Manifested and the Subject Vehicles are Merchantable

Plaintiffs' implied warranty claims fail because the implied warranties applicable to their vehicles do not extend any longer than the NVLWs, and, as discussed, *supra,* Plaintiffs do not allege they sought repairs, or even that their timing chains failed, within the applicable warranty period. *See, e.g., Glass v. BMW of N. Am.*, 2011 U.S. Dist. LEXIS 149199, *49 (D.N.J. Dec. 29, 2011); *Suddreth v. Mercedes-Benz, LLC,* 2011 U.S. Dist. LEXIS 126237, *12-13 (D.N.J. Oct. 31, 2011); *Brisson v. Ford Motor Co.*, 602 F.Supp.2d 1227, 1232 n.5 (M.D.

Fla. 2009), *aff'd in relevant part and rev'd on other grounds*, 349 F. App'x 433 (11th Cir. 2009). The NVLWs expressly state: "Any implied warranty…is limited in duration to the period of this written warranty." *See* Cameron Decl. dated Dec. 5, 2016, Ex. A at 2; *see also* Exs. B-H. This is fatal to Plaintiffs' implied warranty claims.

Furthermore, the implied warranty claims of all Plaintiffs must be dismissed because they have not pleaded facts showing that their vehicles are unmerchantable. Under the U.C.C. and the applicable state statutes, goods are not merchantable when they are not "fit for the ordinary purposes for which such goods are used." *See, e.g.,* U.C.C. § 2-314. As this Court has previously determined, "[t]he weight of authority, from courts across the country, indicates that plaintiffs may not recover for breach of the implied warranty of merchantability…where plaintiffs have driven their cars without problems for years." *See Sheris v. Nissan N. Am., Inc.*, 2008 U.S. Dist. LEXIS 43664, *16 (D.N.J. June 2, 2008). Here, as Plaintiffs have failed to assert that their vehicles experienced any timing chain failure within the applicable warranty period, and have been able to drive their vehicles for years without issue, they have not shown that their vehicles are unfit for their ordinary purpose. *See id.*; *Suddreth*, 2011 U.S. Dist. LEXIS 126237, at *13-14; *Glass*, 2011 U.S. Dist. LEXIS 149199, at *49-50.

B. Many of Plaintiffs' Implied Warranty Claims Must Be Dismissed Because Plaintiffs Are Not in Privity with Defendants

The implied warranty claims under the laws of California, Connecticut, Florida, Georgia, Illinois, Michigan, Nevada, New York, North Carolina, Ohio, and Washington fail because Plaintiffs do not allege that they are in vertical privity with Defendants. Under the laws of these states, vertical privity is a prerequisite to sustain an implied warranty claim for economic damages.[18] Plaintiffs Nadiri, Piumarta, Swihart, Ellahie, Serbia, Molwitz, Gaudet, Blanchard, Lopez, Mekbeb, A. Fleck, W. Fleck, Smith, Sensnovis, Calihan, Haggerty, Zielezinski, Melman, Deib, Panepinto, Oles, Scott, and Gossman did not purchase their vehicles from—and therefore were not in privity with—VWGoA. As such, their implied warranty claims must be dismissed.

Plaintiffs attempt to circumvent the lack of privity with two conclusory allegations: (1) that Plaintiffs have had sufficient direct dealings with the VW defendants or their agents (dealerships) to establish privity; and (2) "privity is not required" because they "are intended third-party beneficiaries of contracts between Defendants and their dealers, and specifically, of their implied warranties." Compl. ¶ 275. Neither saves Plaintiffs' claims from dismissal.

---

[18] *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008); *TD Props. v. VP Bldgs., Inc.*, 602 F. Supp. 2d 351, 362 (D. Conn. 2009); *Speier-Roche v. Volkswagen Grp. of Am., Inc.*, 2014 U.S. Dist. LEXIS 59991 (S.D. Fla. Apr. 30, 2014); *Monticello v. Winnebago Indus*., 369 F. Supp. 2d 1350, 1361 (N.D. Ga. 2005); *Ibarolla v. Nutrex Research, Inc.*, 2012 U.S. Dist. LEXIS 155721 (N.D. Ill. Oct. 31, 2012); *Harnden v. Ford Motor Co.*, 408 F. Supp. 2d 315, 322 (E.D .Mich. 2005); *aff'd sub nom. Harnden v. Jayco Inc.*, 496 F.3d 579 (6th Cir. 2007); *Gillson v. City of Sparks*, 2007 U.S. Dist. LEXIS 19350 (D. Nev. Mar. 19, 2007); *In re Scotts EZ Seed Litig*., 2013 U.S. Dist. LEXIS 73808, *24-25 (S.D.N.Y. May 22, 2013); *Kelly v. Ga.-Pac. LLC*, 671 F. Supp. 2d 785 (E.D.N.C. 2009); *Curl v. Volkswagen of Am., Inc.*, 114 Ohio St. 3d 266 (2007); *Baughn v. Honda Motor Co*., 107 Wash.2d 127, 151 (1986).

The Complaint is devoid of any factual allegation even remotely suggesting "sufficient direct dealings" between Plaintiffs and Defendants establishing privity. *See* Compl. ¶ 275. In addition, Plaintiffs' attempt to establish a privity relationship with Defendants based upon their dealings with authorized dealerships fares no better. First, Plaintiffs Melman, Lopez, Mekbeb, Deib, and Gossman fail to even allege that they purchased their vehicles from authorized Volkswagen/Audi dealerships. Compl. ¶¶ 24, 36, 37, 46, 55. Further, the conclusory "agency" allegation of all Plaintiffs does not come close to pleading facts sufficient to establish a true agency relationship between Defendants and the authorized dealerships from whom Plaintiffs allegedly purchased or leased their vehicles. It is fundamental that "one who receives goods from another for resale to a third person is not hereby the other's agent in the transaction." Restatement (Second) of Agency § 14(j). Thus, the mere fact that a dealership is authorized to sell VW or Audi vehicles does not make it the agent of any Defendant. *See, e.g., id.*(stating in comment *e*, that automobile dealers are purchasers, rather than agents, of the manufacturers); *Bushendorf v. Freightliner Corp.*, 13 F.3d 1024, 1026 (7th Cir.

1993) ("an automobile dealer or other similar type of dealer, who . . . merely buys goods from manufacturers or other suppliers for resale to the consuming public, is not his supplier's agent").[19]

Plaintiffs' "third party beneficiary" theory to circumvent the privity requirement fares no better. First, in California, Connecticut and Ohio a consumer may not dodge the privity requirement of an implied warranty claim by asserting that he or she is an intended third-party beneficiary.[20]

Moreover, the Complaint fails to plead the requisite facts identifying or describing the contracts or warranty agreements under which Plaintiffs claim third party beneficiary status, let alone articulate how or why these particular Plaintiffs appear to be the intended beneficiaries of these agreements. *See Catalano v. BMW of N. Am., LLC*, 2016 U.S. Dist. LEXIS 25622, *37-38 (S.D.N.Y. Mar. 1, 2016).[21]

---

[19] *See also Nicholson v. Jayco, Inc.*, 2016 U.S. Dist. LEXIS 134469, *52-53 (N.D. Ohio Sep. 29, 2016) ("there is no privity between a vehicle's manufacturer and the ultimate consumer because the dealer, generally, does not act as the manufacturer's agent"); *Speier-Roche v. Volkswagen Grp. of Am.*, 2014 U.S. Dist. LEXIS 59991, *23 (S.D. Fla. Apr. 30, 2014); *Herremans v. BMW of N. Am., LLC*, 2014 U.S. Dist. LEXIS 145957, *18-19 (C.D. Cal. Oct. 3, 2014); *In re Scotts EZ Seed Litig.*, 2013 U.S. Dist. LEXIS 73808, *24-25 (S.D.N.Y. May 22, 2013); *Keegan v. Am. Honda Motor Co*, 838 F. Supp. 2d 929, 953 (C.D. Cal. 2012); *Hackett v. BMW of N. Am., LLC*, 2011 U.S. Dist. LEXIS 71063, *4 (N.D. Ill. June 30, 2011); *Ocana v. Ford Motor Co.*, 992 So. 2d 319, 326 (Fla. Dist. Ct. App. 2008).

[20] *See Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1083 (N.D. Cal. 2011); *McKinney v. Bayer Corp.*, 744 F. Supp. 2d 733, 757-58 (N.D. Ohio Sep. 30, 2010); *Kahn v. Volkswagen of Am., Inc.*, 2008 Conn. Super. LEXIS 376 (Feb. 13, 2008).

C. Plaintiffs Fail to Allege They Provided VW with the Requisite Pre-Suit Notice

As with their claims for breach of express warranty, Plaintiffs have failed to allege that they provided Defendants with notice of the alleged breach of the implied warranty of merchantability. For this reason, the Court should dismiss the implied warranty claims of all Plaintiffs other than Kansas Plaintiff Mody.

D. Certain Of Plaintiffs' Breach Of Implied Warranty Claims Are Barred By The Statute Of Limitations

California, Connecticut, Michigan, Minnesota, New Jersey, New York, Ohio and Texas impose a four-year statute of limitations on implied warranty claims. *See* Cal. Com. Code § 2725; Conn. Gen. Stat. §42a-2-725; Mich. Comp. Laws Serv. §440.2725; Minn. Stat. §336.2-725; N.J. Stat. Ann. §12A:2-725; N.Y. U.C.C. Law § 2-725; Ohio Rev. Code Ann. § 1302.98; Tex. Bus. & Com. Code

[21] *J. C. Penney Props. v. Hiram LL, LLC*, 2016 U.S. Dist. LEXIS 8027, *10 (N.D. Ga. Jan. 25, 2016); *Kirsopp v. Yamaha Motor Co.*, 2015 U.S. Dist. LEXIS 68639, *19 (C.D. Cal. Jan. 7, 2015); *Babb v. Regal Marine Indus.*, 2015 Wash. App. LEXIS 369 (Ct. App. Feb. 24, 2015); *Baughan v. Royal Caribbean Cruises, Ltd.*, 944 F. Supp. 2d 1216, 1218 (S.D. Fla. 2013); *Montgomery v. Kraft Foods Glob., Inc.*, 2012 U.S. Dist. LEXIS 173035, *40-41 (W.D. Mich. Dec. 6, 2012); *R&O Constr. Co. v. Rox Pro Int'l Group, Ltd.*, 2011 U.S. Dist. LEXIS 131633, *9-10 (D. Nev. Nov. 14, 2011); *Hospira Inc. v. AlphaGary Corp.*, 671 S.E.2d 7, 13 (N.C. Ct. App. 2009); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 21 F. Supp. 2d 593, 600 (E.D. La. 1998); *Outboard Marine Corp. v. Babcock Indus., Inc.*, 1995 U.S. Dist. LEXIS 6429, *16-17 (N.D. Ill. May 10, 1995); *Cullen v. BMW of N. Am., Inc.*, 531 F. Supp. 555, 560 (E.D.N.Y. 1982).

Ann. §2.725. Courts in these jurisdictions hold that implied warranty claims accrue at the time that goods are delivered and that there is no discovery rule because an implied warranty, by its nature, cannot "explicitly" extend to future performance, as is required for a discovery rule to apply. *Cardinal Health 301, Inc. v. Tyco Elecs. Corp.*, 87 Cal. Rptr. 3d 5, 19-20 (Ct. App. 2008) ("Because an implied warranty is one that arises by operation of law rather than by an express agreement of the parties, courts have consistently held it is not a warranty that 'explicitly extends to future performance of the goods … .') (citation omitted).[22]

Plaintiffs' claims under California, Connecticut, Minnesota, New Jersey, New York, Ohio and Texas law should be dismissed to the extent that they are asserted on behalf of individuals who purchased Audi vehicles prior to August 22, 2012 and, due to the existence of the five-year Powertrain Warranty, individuals who purchased Volkswagen vehicles prior to August 22, 2011—*i.e.*, Swihart (CA) (purchased Audi in "late 2011" (Compl. ¶ 29)), Molwitz (CT) (purchased Volkswagen in 2009 (Compl. ¶ 56)), Gaudet (CT) (purchased Volkswagen on January 1, 2011 (Compl. ¶ 59)), Melman (NY) (purchased Volkswagen in 2009

---

[22] *Collins v. A-1 Auto Serv.*, 2013 Conn. Super. LEXIS 120 (Jan. 15, 2013); *Hensley v. Colonial Dodge, Inc.*, 245 N.W.2d 142 (Mich. Ct. App. 1976); *Marvin Lumber and Cedar v. PPG Indus., Inc.*, 223 F.3d 873 (8th Cir. 2000); *Coba v. Ford Motor Co.*, 2013 U.S. Dist. LEXIS 8366 (D.N.J. Jan 22, 2013); *Holdridge v. Heyer-Schulte Corp.*, 440 F. Supp. 1088, 1104 (N.D.N.Y. 1977); *Beck v. Trane Co.*, 1990 Ohio App. LEXIS 5614, at *5 (Ct. App. Dec. 19, 1990); *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544 (Tex. 1986).

(Compl. ¶ 24)), Kane (TX) (purchased Audi in 2009 (Compl. ¶ 54)), Serbia (CT),[23] Scott (OH),[24] Zhao (MN),[25] and Drake (NJ).[26]

Finally, Plaintiffs' attempts to toll the statute of limitations fail for the reasons stated in Section V.F, *supra*.

VII. PLAINTIFFS MAGNUSON-MOSS WARRANTY ACT CLAIM MUST BE DISMISSED

In order to state a MMWA claim for breach of warranty, a plaintiff must adequately plead a breach of warranty under state law. *Cooper v. Samsung Elecs. Am., Inc.*, 2008 U.S. Dist. LEXIS 75810, *18-19 (D.N.J. Sep. 30, 2008). Since Plaintiffs here failed to state a breach of warranty claim under state law, the Magnuson-Moss Act warranty claim must likewise be dismissed.

---

[23] While the Complaint alleges that Plaintiff Serbia bought a new 2011 Volkswagen vehicle, it does not specify the date of purchase. However, VWGoA's records establish that Serbia bought the vehicle on August 16, 2011. *See* Cameron Decl. dated Dec. 5, 2016, Ex. I.

[24] While the Complaint alleges that Plaintiff Scott bought a 2011 Volkswagen Vehicle, it does not specify the date of purchase. However, VWGoA's records establish that Scott purchased the vehicle on April 28, 2011. *See* Cameron Decl. dated Dec. 5, 2016, Ex. J.

[25] While the Complaint alleges that Minnesota Plaintiff Zhao bought a new 2012 Audi vehicle, it does not specify the date of purchase. Compl. ¶ 44. However, VWGoA's records establish that Zhao bought the vehicle on June 4, 2012. *See* Cameron Decl. dated Dec. 5, 2016, Ex. L.

[26] Drake asserts that he purchased a 2010 VW GTI vehicle from an authorized dealer. Compl. ¶ 26. Thus, his claim brought on August 22, 2016 is time barred. VWGoA has records showing Drake purchased a 2012 GTI on June 28, 2012 from Evans Motorworks. *See* Cameron Decl. dated Dec. 5, 2016, Ex. M. If Plaintiff's allegation was in error, and this is the vehicle owned by Plaintiff, his claim is nonetheless time barred.

VIII. PLAINTIFFS' BREACH OF CONTRACT CLAIM MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM

Plaintiffs' common-law breach of contract claim is premised upon the conclusory allegation that "Every purchase or lease…from an authorized dealer…constitutes a contract between Defendants and purchaser or lessee." Compl., ¶ 228.

First, as this claim by its terms only applies to those Plaintiffs who purchased or leased vehicles from authorized dealers, this claim should be dismissed as to those Plaintiffs who did not purchase or lease vehicles from authorized dealers, including Stockalper, Melman, LeMoine, Mekbeb, Johnson, Noyes, Deib, Schaffranek, and Gossman.

Second, there is no basis for the legal conclusion that the purchase of a vehicle from a dealer constitutes a contract between each Plaintiff and VWGoA—a remote importer and distributor with whom no Plaintiff was in privity.[27] In fact, not one Plaintiff pleads that he or she purchased a vehicle directly from VWGoA. The claim thus fails because there can be no contract between a consumer and a remote manufacturer or distributor in the absence of privity. This is true even where a purchase is made from an authorized dealer.[28]

---

[27] *See, e.g.*, *Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 980-81 (C.D. Cal. 2014) (dismissing contract claim with prejudice, writing "Plaintiffs disingenuously and in conclusory fashion allege the existence of a purchase contract with Toyota….because Plaintiffs did not purchase their vehicles from Toyota, it would be impossible for them to allege such a purchase contract."); *Miller v. Chrysler Group LLC*, 2014 U.S. Dist. LEXIS 90314, at *23 (D.N.J. June 30, 2014); *Ossolinski v. Ford Motor Co.*, 2014 Conn. Super. LEXIS 1994, at *21-22 (Conn. Super. Ct. Aug. 12, 2014); *Greene v. BMW of N. Am.*, 2012 U.S. Dist. LEXIS 168695, at *13-14 (D.N.J. Nov. 28, 2012); *Daigle v. Ford Motor Co.*, 713 F. Supp. 2d 822, 828-829 (D. Minn. 2010); *Frey v. Grumbine's RV*, 2010 U.S. Dist. LEXIS 120659, at *13-15 (M.D. Pa. Nov. 15, 2010) (dismissing consumer's

Next, Plaintiffs' second conclusory assertion—that defendants breached the alleged contracts by sale and lease of defective goods and nondisclosure of the alleged defect—fails as a matter of law. *See* Compl. ¶ 230. In a UCC sale of goods, delivery of nonconforming goods is not a breach of contract; it is a breach of warranty. This is an important distinction under the UCC, since breach of contract and breach of warranty are governed by different Code sections, and entail different remedies and different rights and obligations.[29] Finally, Plaintiffs' claim

---

breach of contract claim against RV manufacturer with prejudice since purchase was made from retailer).

[28] *See, e.g., Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008) ("an end consumer such as Clemens who buys from a retailer is not in privity with a manufacturer"); *Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 979-81 (C.D. Cal. 2014); *Haag v. Hyundai Motor Am.*, 969 F. Supp. 2d 313, 316-317 (W.D.N.Y. 2013); *Greene v. BMW of N. Am.*, 2013 U.S. Dist. LEXIS 132579, at *9-11 (D.N.J. 2013); *Feldman v. Mercedes-Benz United States, LLC*, 2012 U.S. Dist. LEXIS 178924, at *27-28 (D.N.J. Dec. 18, 2012).

[29] *See, e.g., A.O. Smith Corp. v. Elbi S.P.A.*, 123 Fed. Appx. 617, 619 (5th Cir. 2005) ("breach of contract damages are not available when a buyer accepts non-conforming goods. In that instance, breach of warranty is the remedy."); *Sw. Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991) ("The UCC recognizes that breach of contract and breach of warranty are not the same cause of action. The remedies for breach of contract are set forth in section 2.711, and are available to a buyer "where the seller fails to make delivery." Tex. Bus. & Com. Code § 2.711(a) (West 1967). The remedies for breach of warranty, however, are set forth

for breach of the covenant of good faith and fair dealing cannot exist as a standalone claim without a breach of contract. As Plaintiffs' contract claim is, at best, a repackaging of their warranty claim, this cause of action must fail as duplicative and not an independent basis for recovery.[30]

IX. PLAINTIFFS LACK ARTICLE III STANDING TO BRING COMMON-LAW FRAUD, STATUTORY FRAUD OR NEGLIGENT MISREPRESENTATION CLAIMS

It is well settled that Article III standing requires plaintiffs to plead an injury that is "fairly traceable" to the conduct of defendants. *See Toll Bros., Inc. Twsp. Of Readington*, 555 F.3d 131, 142 (3d Cir. 2009) ("The second requirement of Article III standing is 'traceability.' If the injury-in-fact prong focuses on *whether* the plaintiff suffered harm, then the traceability prong focuses on *who* inflicted that harm."). Here, Plaintiffs' fraud-based claims fail to plead an injury traceable to the conduct of VWGoA. Plaintiffs' claims hinge on the general allegation, repeated

---

in section 2.714, and are available to a buyer who has finally accepted goods, but discovers that the goods are defective in some manner. Tex. Bus. & Com. Code § 2.714, § 2.711 (Comment 1)"); *Becker v. Cont'l Motors, Inc.*, 2015 U.S. Dist. LEXIS 150996, at *14 (N.D. Tex. Nov. 2, 2015) ("Under the UCC in Texas, breach of contract and breach of warranty are separate and distinct causes of action, each with different available remedies."); *Luig v. North Bay Enters.*, 55 F. Supp. 3d 942, 947 (N.D. Tex. 2014) ("Texas law forbids conflating breach of warranty and breach of contract"); *Ellis v. Precision Engine Rebuilders, Inc.*, 68 S.W.3d 894, 896-897 (Tex. App. 2002) ("Because Ellis's claim is based on the receipt of defective goods, he has a breach of warranty cause of action, not a breach of contract case").

[30] *See Feldman v. Mercedes-Benz United States, LLC*, 2012 U.S. Dist. LEXIS 178924, at *28 (D.N.J. Dec. 18, 2012).

multiple times throughout the Complaint, that they would not have purchased or would have paid less for their vehicles (*see*, *e.g.*, Compl. ¶ 184) absent (i) "misrepresentations and omissions [that] were *received by* Plaintiffs and members of the Classes prior to and at the point of their Cass Vehicle purchase or lease, including misrepresentations and omissions in the owner's manual and the USA Warranty and Maintenance pamphlets" (Compl. ¶ 143), or (ii) "material misrepresentations, fraudulent statements and/or material omissions of employees and agents of Defendants" (Compl. ¶ 142). Plaintiffs thus plead merely that they received documents from authorized Volkswagen and Audi dealers, but nowhere state that they read the documents or that they reviewed anything in such documents about the timing chain, let alone that they relied upon them as part of the basis of the bargain. Further, Plaintiffs nowhere specify the content of any representations or provide context for any omissions made at the point of purchase by any employees or agents of VWGoA, nor do they specify how any alleged misrepresentations became a basis of the bargain or otherwise affected their decision to purchase their vehicles. Allegations of "beliefs and expectations" that are not tied to "what the parties agreed"—like Plaintiffs' allegations regarding the timing chain system here—are clearly insufficient to establish Article III standing. *Austin-Spearman v. AARP & AARP Servs. Inc.*, 119 F. Supp. 3d 1, 13 (D.D.C. 2015); *see also Harnish v. Widener Uni. Sch. of Law*, 833 F.3d 298, 309 n.5 (3d

Cir. 2016) (benefit of the bargain is a "contract-like" theory of injury). Accordingly, Plaintiffs have failed to plead facts establishing that VWGoA's conduct caused their alleged injuries, requiring dismissal pursuant to Rule 12(b)(1). *See In re Gerber Probiotic Sales Practices Litig.*, 2013 U.S. Dist. LEXIS 121192, at *21 (D.N.J. Aug. 22, 2013) (Linares, J.) (dismissing claims pursuant to Rule 12(b)(1) due to plaintiffs' failure to "allege facts as to how misrepresentations…caused their injuries").

X. PLAINTIFFS' COMMON-LAW FRAUD CLAIMS FAIL TO PLEAD FRAUD WITH PARTICULARITY

The common law of fraud of the twenty-two states implicated in this action differ in multiple respects; however, they all have the same basic requirements of plaintiffs' reliance on a false representation of fact or a material omission of information that a defendant has a duty to disclose.[31] Here, Plaintiff has failed to plead facts establishing any of these elements with the particularity required by Rule 9(b).

---

[31] *See, e.g.*, Restatement (Second) of Torts, § 525 (1979) ("One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation."); *see also, Mercer Cnty. Children's Med. Daycare, LLC v. O'Dowd*, 2015 U.S. Dist. LEXIS 124874, at *11-12 (D.N.J. Sept. 18, 2015) ("To assert a common-law fraud claim in New Jersey, a plaintiff must establish (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. The failure to reveal a fact can be fraudulent if there is a duty to disclose."); *Gianninoto v. IRS*, 2016 Bankr. LEXIS 3016, at *17-18 (Bankr. D.N.J. Aug. 15, 2016) (for fraudulent omission in New Jersey, a plaintiff must prove the following elements: (1) the defendant violated a duty to disclose a

A. Plaintiffs Fail to Plead An Actionable Misrepresentation

Plaintiffs fail to plead a misrepresentation with the required particularity. Indeed, in their 201-page Complaint, Plaintiffs fail to identify a single false statement of fact upon which they relied in purchasing their vehicles. Instead, the Complaint merely alleges—at best—that Plaintiffs somehow inferred, based on the maintenance schedules, that the timing chain systems would last for what Plaintiffs conclusorily refer to as the "useful and expected life" of the vehicles. *See* Compl. ¶ 142, 181. Such an inference is not actionable. *See, e.g.*, *Sears, Roebuck & Co. v. Tyco Fire Prods. LP*, 833 F. Supp. 2d 892, 899 (N.D. Ill. 2011) (An "agree[ment] to inspect…sprinklers [following 50 years of use] in accordance with certain [statutory] standards is not the equivalent of an express written warranty of the sprinkler head's useful life"); *Heyman v. Citimortgage, Inc.*, 2014 U.S. Dist. LEXIS 129025, at *12 (D.N.J. Sep. 15, 2014) (fraud claim based on a bank's provision of a loan modification that the bank allegedly knew Plaintiffs could not afford did "not establish that a knowing misrepresentation was made" when "[t]he

---

material fact; (2) the defendant acted knowingly and with intent to deceive; (3) the plaintiff would have acted differently if she had known about the concealed fact; and (4) the plaintiff sustained damages as a result of the fraudulent omission).

complaint [did] not allege, for example, that anyone at [the bank] stated to [plaintiffs] that they could afford the loan modification program.").

Plaintiffs never allege that Defendants actually made any affirmative misrepresentations that Plaintiffs relied upon regarding the timing chain system or the useful life of the vehicles in the Warranty Manuals or elsewhere,[32] let alone set forth in what advertising or through which individual(s) Defendants allegedly made any such misstatements.[33] The Warranty Manuals do not contain anything

---

32 To the extent that Plaintiffs rely on allegations that "Defendants extensively advertised that Class Vehicles were superior in construction and extolled the quality and virtues of class vehicles," Plaintiffs nowhere provide the "who," "what," "when," "where" and "how" of any such representations (as they must in order to satisfy Rule 9(b)) and, in any event, such statements constitute, at best, non-actionable puffery. *See Argabright v. Rheem Mfg. Co.*, No. 15-5243 (JBS/AMD), 2016 U.S. Dist. LEXIS 108478, at *58 (D.N.J. Aug. 15, 2016) (collecting cases); *Davis v. Byers Volvo*, 2012-Ohio-882, ¶ 31 (Ct. App.) (collecting cases).

33 This case is thus readily distinguishable from *Skeen v. BMW of N. Am., LLC*, 2014 U.S. Dist. LEXIS 9256 (D.N.J. Jan. 24, 2014), where plaintiffs relied on an affirmative representation by defendant that "the 'timing chain . . . remains maintenance-free throughout the full running life of the engine.'" In *Chiarelli v. Nissan N. Am., Inc.*, 2015 U.S. Dist. LEXIS 129416 (E.D.N.Y. 2015), another timing chain case, the court dismissed all of plaintiffs' claims, except for certain omissions-based consumer protection claims. The court recognized that in many states the issue of whether an omissions-based consumer protection claim is viable where there is an unbreached warranty is unsettled and that the court would have to guess at what the states' highest courts would rule on the issue. *See id.* at **36-37. This Court, should it consider the issue, is free to reach its own conclusions based on disparities between the facts here and in *Chiarelli*. For example, the *Chiarelli* plaintiffs, unlike Plaintiffs here, pled defendants' exclusive knowledge of a defect (and therefore a duty to disclose) by explaining not only that defendants

suggesting that vehicles will last for any amount of time past the limited warranty periods or that components of the vehicles will not require replacement, conditioning, maintenance or repairs other than those set forth in the maintenance schedules. Indeed, neither the phrases "useful life" or "timing chain" nor their equivalents appear anywhere in the maintenance schedules. *See, e.g.*, Cameron Decl. dated Dec. 5, 2016, Ex. D at pp. 28-39. Accordingly, Plaintiffs cannot assert that the maintenance schedules—which merely recommend service to certain vehicle components at certain intervals—represent that every Volkswagen or Audi vehicle has a "useful life" of at least 120,000 miles before which it or any of its component parts will not require repair. Indeed, in light of the fact that vehicles contain many component parts not referenced in the maintenance schedules—all of which a reasonable consumer would understand to be subject to wear and tear—such a guarantee would be absurd. In the absence of such a guarantee, the maintenance schedules make no representations regarding the useful life of the product. *See, e.g.*, *Sears, Roebuck & Co.*, 833 F. Supp. 2d at 899. Indeed, the only

---

redesigned components of the tensioner system, but also that the redesign eliminated the defect. *Id*. at *6 (Plaintiffs pled that "[t]he new part featured thicker plastic materials, and a more durable 'hook' shape to prevent it from breaking, sliding out of place, and/or becoming unseated from the tensioner."). *Falco v. Nissan North Am., Inc.*, 2013 U.S. Dist. LEXIS 147060 (C.D. Cal. Oct. 10, 2013), is not binding here for similar reasons and because the facts from which plaintiffs sought to impute pre-sale knowledge of the defect to Nissan occurred before most class vehicles were manufactured. *Id*.

guarantees referenced in the Complaint are the 3 year/36,000 mile and 4 year/50,000 mile NVLWs and the 5 year/60,000 mile powertrain warranty to repair and replace components of various class vehicles—representations that Plaintiffs do not and cannot allege to be false and that belie any expectations regarding the useful life of the class vehicles or the timing chain system.

Plaintiffs' vague and conclusory assertion that unspecified misrepresentations regarding the class vehicles and their timing chain systems were "received by Plaintiff and members of the Classes prior to and at the point of their Class Vehicle purchase or lease" (Compl. ¶ 69) is insufficient under Rule 9(b) to notify Defendants of the specific who, what, when, where and how of the fraud alleged. Indeed, Plaintiffs' allegations that they merely "received" the alleged "misrepresentations and omissions" contained in the manuals or elsewhere falls short of pleading that they "read," "reviewed," or "relied upon" any of these alleged sources. Further, the vast majority of Plaintiffs do not even plead the precise dates of their purchase of class vehicles, do not specifically identify the individuals involved in the transactions and, with few exceptions, fail to identify the specific dealerships involved, and do not identify what was allegedly represented, when and by whom. Accordingly, Plaintiffs' fraud claims should be dismissed for failure to comply with Rule 9(b) to the extent predicated on alleged misrepresentations. *See In re Supreme Specialties Inc. Sec. Litig.*, 438 F.3d 256, 276-77 (3d Cir. 2006).

B. Plaintiffs Fail to Plead an Omission of Information that Defendants Were Under a Duty to Disclose[34]

The relevant jurisdictions have different formulations of and different substantive requirements for pleading a duty to disclose. As set forth below, Plaintiffs have failed to plead sufficient facts to satisfy any of these requirements.

i. The Arkansas, New Jersey, Georgia, Illinois, and South Carolina Plaintiffs' Fraudulent Omission Claims Must Be Dismissed Due to the Absence of a Relationship Between Plaintiffs and Defendants Giving Rise to a Duty to Disclose

New Jersey, Georgia, Illinois, and South Carolina recognize a duty to disclose if and only if there is a fiduciary or other special relationship between the plaintiff and the defendant. *See N.J. Econ. Dev. Auth. v. Pavonia Rest., Inc.*, 319 N.J. Super. 435, 446 (App. Div. 1998) ("a party has no duty to disclose information to another party in a business transaction unless a fiduciary relationship exists between them, unless the transaction itself is fiduciary in nature, or unless one party 'expressly reposes a trust and confidence in the other.'") (citation omitted); *Lilliston v. Regions Bank*, 653 S.E.2d 306, 309 (Ga. Ct. App.

---

[34] As noted above, Plaintiffs plead only that they "received" manuals or other documents or advertisements from Defendants containing certain alleged misrepresentations and omissions. *See* Compl. ¶ 143. Nowhere do they plead that they actually reviewed or relied on these alleged sources, requiring dismissal of both Plaintiffs' misrepresentation- and omission-based fraud claims.

2007); *Greenberger v. GEICO General Ins. Co.*, 631 F.3d 392, 401 (7th Cir. 2011) (applying Illinois law); *Pitts v. Jackson Nat'l Life Ins. Co.*, 574 S.E.2d 502, 510 (S.C. Ct. App. 2002). Further, in Arkansas, plaintiffs and defendants must be in either a fiduciary relationship or in contractual privity for a duty to disclose to attach. *See, e.g.*, *Perez v. Volkswagen Grp. of Am.*, No. 2:12-CV-02289, 2013 U.S. Dist. LEXIS 54845, at *29-30 (W.D. Ark. Apr. 17, 2013) (dismissing fraudulent omission claim and noting that "even if [plaintiff] had made an adequate showing that Defendant knew or should have known of a latent defect in the transmission systems of her vehicles, it is clear that there was no privity of contract at any time between Defendant and [plaintiff], and no confidential or fiduciary relationship exists or existed between them").

Arm's-length transactions such as the sale of a vehicle do not give rise to a fiduciary or other special relationship between a purchaser and a manufacturer. *See Stevenson v. Mazda Motor of Am., Inc.*, 2015 U.S. Dist. LEXIS 70945, at *27 (D.N.J. June 2, 2015) (car manufacturer had no duty to disclose alleged defect to car purchaser because "there [were] no allegations to suggest that defendant did anything that would have encouraged Plaintiff to place particular trust or confidence in it"); *Coba v. Ford Motor Co.*, 2013 U.S. Dist. LEXIS 8366, at *37 (D.N.J. Jan. 22, 2013) ("New Jersey Courts have found no special relationship between individual consumers and automobile manufacturers that would impose a duty to disclose on the manufacturers”).

Here, Plaintiffs do not plead facts establishing a fiduciary or other special relationship, as they must to state a fraudulent omission claim under New Jersey, Georgia, Illinois and South Carolina law. Further, they fail to plead contractual privity for the purposes of establishing a duty to disclose under Arkansas law. Accordingly, the omission-based fraud claims of Plaintiffs Zimand, Drake, A. Fleck, W. Fleck, Smith, Sensnovis, Callahan, Borchino, and Stockalper must be dismissed.

ii. The Ohio and Texas Plaintiffs’ Fraudulent Omission Claims Must Be Dismissed Due to the Absence of a Fiduciary Relationship or a Partial Disclosure

Ohio and Texas recognize duties to disclose only where there is a fiduciary or special relationship of a type absent here or where the defendant makes a misleading partial disclosure. *See Gator Dev. Corp. v. VHH, Ltd.*, 2009-Ohio-1802, ¶ 28 (Ohio Ct. App. Apr. 17, 2009); *Yoon v. Yoo*, 2016 U.S. Dist. LEXIS 129268, at *8 (N.D. Tex. Feb. 24, 2016). Here, as discussed in Sections X.B.i and X.A, *supra*, Plaintiffs not only fail to plead the existence of a fiduciary or other special relationship, but also fail to plead the existence of any affirmative misrepresentation, let alone a partial representation, regarding the timing chain system or the class vehicles.

Further, to the extent that Plaintiffs rely on alleged partial disclosures and/or misrepresentations post-dating their purchases (including alleged attribution of the "the Timing Chain System failures to other factors and/or exculpating conditions for which Defendants had no responsibility" and/or alleged "secret repairs") (Compl. ¶¶ 201, 364), Plaintiffs nowhere identify who made these partial disclosures, misrepresentations and/or secret repairs, what exactly was said, when it was said, or where it was said, as they must in order to satisfy Rule 9(b).

Accordingly, Plaintiffs Scott and Kane have failed to plead actionable omissions, and their common-law fraud claims must be dismissed.

iii. Plaintiffs Fail to Satisfy the Requirements for Pleading a Duty to Disclose Under the Law of Any Other Jurisdiction

In the absence of a fiduciary or other special relationship or a misleading partial disclosure, the remaining jurisdictions invoked by Plaintiffs find a duty to disclose where either one or both of the following circumstances is present: (i) Defendants' exclusive or superior knowledge of the alleged omitted information, or (ii) active concealment of the alleged omitted information by Defendants.[35]

---

[35] *See Song Fi, Inc. v. Google, Inc.*, 2016 U.S. Dist. LEXIS 45547, at *22 (N.D. Cal. Apr. 4, 2016); *Mallon Oil Co. v. Bowen/Edwards Assocs., Inc.*, 965 P.2d 105, 111 (Colo. 1998); *Bac Home Loans Serv. v. Farina*, 2010 Conn. Super. LEXIS 4929, at *1-2 (Conn. Super. Ct. June 2, 2010); *Mukamal v. GE Capital Corp. (In re Palm Beach Fin. Partners, L.P.)*, 517 B.R. 310, 335 (Bankr. S.D. Fla. 2013); *Fifth Third Bank v. Double Tree Lake Estates, LLC*, 2013 U.S. Dist. LEXIS 20234, at *21-22 (N.D. Ind. Feb. 12, 2013); *Kestrel Holdings I, L.L.C. v. Learjet Inc.*, 316 F. Supp. 2d 1071, 1078 (D. Kan. 2004); *Dean v. Beckley*, 2010 U.S. Dist.

1. Plaintiffs Fail to Plead Facts Establishing Defendants' Exclusive or Superior Knowledge

Plaintiffs plead no facts demonstrating that Defendants had exclusive or superior knowledge of a defect in the timing chain system at the time that they purchased their automobiles, or at any other time. Plaintiffs allege Defendants' exclusive knowledge of a defect based on the existence of certain TSBs, certain complaints filed by consumers with NHTSA, and an alleged redesign of components of the timing chain system in or around 2012. These allegations fail to establish the existence of exclusive or superior knowledge of an alleged defect.

First, the alleged TSBs fail to establish VWGoA's knowledge of a defect affecting all class vehicles. The first two TSBs relied upon by Plaintiffs—issued on or around June 8, 2010 and April 15, 2011, respectively—merely indicate that dealers were informed of the potential for noises to emanate from the timing chain system, potential damage to the camshaft, and for difficulty in starting the engines

---

LEXIS 105007, at *16 (D. Md. Oct. 1, 2010); *Glidden Co. v. Jandernoa*, 5 F. Supp. 2d 541, 551, 553 (W.D. Mich. 1998); *Graphic Commc'ns. Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp.*, 850 N.W.2d 682, 695 (Minn. 2014); *Heldenbrand v. Multipoint Wireless, LLC*, 2012 U.S. Dist. LEXIS 150634, at *13-14 (D. Nev. Oct. 18, 2012); *King v. Philip Morris, Inc.*, 2000 N.H. Super. LEXIS 5, at *26 (N.H. Super. Ct. 2000); *Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.*, 68 F.3d 1478, 1483-84 (2d Cir. 1995) (applying New York law); *McKee v. James*, 2013 NCBC 38, ¶ 51 (N.C. Super. Ct. 2013); *Gaines v. Krawczyk*, 354 F. Supp. 2d 573, 586 (W.D. Pa. 2004); *White v. Zhou Pei*, 452 S.W.3d 527, 537-38 (Tex. App. 2014); *Lovell v. P.F. Chang's China Bistro, Inc.*, 2015 U.S. Dist. LEXIS 112101 at *17-18 (W.D. Wash. Mar. 27, 2015) (citation omitted).

of only three of the class vehicles. *See* Compl. ¶¶ 112-13. According to the Complaint, it was not until on or around December 22, 2011 (after many Plaintiffs had already purchased their vehicles) that a TSB was issued reflecting that "certain models are experiencing engine not starting."

Plaintiffs Melman, Molwitz and Gaudet are specifically alleged to have purchased their vehicles before the issuance of the first TSB, rendering all TSBs relied upon in the Complaint irrelevant to their claims. Additionally, although Plaintiffs artfully decline to plead purchase dates in many instances, the Complaint pleads that Plaintiffs Pipe, Drake, Serbia, Lopez, Mekbeb, Johnson, Oles, and Panepinto purchased vehicles from model years pre-dating the first TSB. Finally, the Complaint fails to plead a TSB covering the 2010 Audi A3 or A4 or the 2012 Audi Q5 or A5. Accordingly, Plaintiffs Kane, Lemoine, Dieb, Piumarta, Smith, Zhao, and Zielezinski—all of whom are alleged to own one of these vehicles—cannot rely on any of the TSBs invoked in the Complaint to establish knowledge.

In any event, the existence of a TSB does not constitute the existence or knowledge of a defect. *Davisson v. Ford Motor Co.*, 2014 U.S. Dist. LEXIS 122673, at *29 (S.D. Ohio Sep. 3, 2014) ("Plaintiffs also fail to explain how or when Ford knew of the alleged defects, other than by resort to the TSBs issued by Ford. But more is required to plead knowledge."); *Am. Honda Motor Co., Inc. v. Superior Court*, 132 Cal. Rptr. 3d 91, 101 (2011) ("A TSB is not and cannot fairly be construed by a trial court as an admission of a design or other defect, because TSB's are routinely issued to dealers to help diagnose and repair typical complaints."). Further, in *Alban v. BMW of N. Am., LLC*, 2011 U.S. Dist. LEXIS 26754 (D.N.J. Mar. 15, 2011) ("*Alban II*"), the court concluded that, as a matter of public policy, it would be inappropriate to hold that TSBs or similar advisories provide a sufficient factual predicate to plead a fraud-based claim:

> [T]he Court is hesitant to view technical service bulletins, or similar advisories, as potential admissions of fraudulent concealment of a defect….Accepting these advisories as a basis for consumer fraud claims may discourage manufacturers from responding to their consumers in the first place.

Id., at *36-37; *see also Wiseberg v. Toyota Motor Corp.*, 2012 U.S. Dist. LEXIS 45849, at *12 n.2 (D.N.J. Mar. 30, 2012) (Linares, J.); *Glass v. BMW of N. Am., LLC*, 2011 U.S. Dist. LEXIS 149199, at *27 n.11 (D.N.J. Dec. 29, 2011) (declining to construe cooperation with a NHTSA investigation as an "admission" of culpability). This principle is consistent with Rule 407 of the Federal Rules of Evidence, which is discussed, *infra*.

Second, Plaintiffs' allegations regarding hearsay consumer complaints made to NHTSA are insufficient to plead Defendants' exclusive or superior knowledge of a defect. As an initial matter, the mere existence of such NHTSA complaints, without well-pleaded facts demonstrating that Defendants knew about a defect based on having actually received these complaints, is not sufficient to plead exclusive or superior knowledge. *See*, *e.g.*, *Gotthelf v. Toyota Motor Sales, U.S.A., Inc.*, 525 F. App'x 94, 104 (3d Cir. 2013) ("The Complaint includes several customer complaints filed with the NHTSA, the earliest of which dates to July 1, 2007. However, these complaints were filed with NHTSA, not with Toyota, and the NHTSA did not notify Toyota of its investigation until May 6, 2009. Gotthelf has provided no facts to support his assertion that Toyota should have known about the defect based on these complaints."). Additionally, the first NHTSA complaint relied upon by Plaintiffs is dated November 12, 2014. Notably, only four Plaintiffs (Piumarta, Gossman, A. Fleck and W. Fleck) claim to have purchased their vehicles at around or after the time of this complaint. Accordingly, the existence of NHTSA complaints is irrelevant to the claims of the vast majority of plaintiffs.

Third, Plaintiffs' conclusory supposition that Defendants knew about a defect in the timing chain system because they redesigned it is of no moment. Plaintiffs fail to explain in anything other than conclusory terms how the redesign addressed the alleged defect. Indeed, although the Complaint alleges that the "Redesigned Tensioner" is "substantially different from the original defective Chain Tensioner," (Compl. ¶ 126), the Complaint does not explain how any alleged differences eliminate the alleged defect or why the redesign evinces Defendants' knowledge of any defect. The closest Plaintiffs come to pleading such details is their mere belief that the use of sintered metal in the ratchet pawl and alternating rows of chain thickness in the original design "likely" contributed to the manifestation of the alleged defect (*see* Compl. ¶¶ 129-130), but they do not plead that the redesign eliminated these features or, even if these features were removed, why any unspecified new features solve any alleged problems with the timing chain system. Accordingly, Plaintiffs' allegations fail to provide a nexus between the redesign and Defendants' state of knowledge regarding the alleged defect.

In any event, a redesign of a product cannot serve to establish a defendant's culpability for—let alone knowledge of—a defect in light of public policy considerations fostering remedial measures by manufacturers, including those embraced by Federal Rule of Evidence 407. *See* Fed. R. Evid. 407 (an alleged remedial measure is "not admissible to prove[] negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction."); *see also Pugh v. Tribune Co.*, 521 F.3d 686, 695 (7th Cir. 2008) (holding on review of Rule 12(b)(6) dismissal that allegations of subsequent remedial measures could not go toward establishing liability and citing Rule 407). Indeed, the Advisory Committee Notes to this rule state that such conduct is "not in fact an admission" and recognize that manufacturers continuously improve their products, resting this rule on a "social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety."

2. Plaintiffs Fail to Plead Facts Establishing Active Concealment of a Defect

Plaintiffs cannot demonstrate active concealment by alleging that Defendants failed to disclose information. Rather, Plaintiffs must allege that Defendants took affirmative steps to hide information from Plaintiffs. *See, e.g.*, *Taragan v. Nissan N. Am., Inc.*, 2013 U.S. Dist. LEXIS 87148, at *24-25 (N.D. Cal. June 20, 2013) ("An allegation of active concealment must plead more than an omission," pleadings must "allege with the requisite specificity" how defendant actively concealed material facts); *Frederick Rd. Ltd. P'shp. v. Brown & Sturm*, 756 A.2d 963, 976 n.14 (Md. 2000); *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 2016 WL 4107717, at *7 (D. Or. Aug. 1, 2016); *Day v. Tri-State Delta Chemicals, Inc.*, 165 F. Supp. 2d 830, 833 (E.D. Ark. 2001).

Here, Plaintiff's allegations of active concealment are conclusory and/or speculative. Plaintiffs do not allege any specific instance prior to or following sale of their vehicles in which VWGoA actively concealed facts. Plaintiffs rely instead on bald and conclusory allegations of "active" conduct that do not meet Rule 8 standards, let alone Rule 9(b) particularity standards.

Plaintiffs allege, in substance, that Defendants attributed timing chain malfunctions to something other than the alleged defect when Plaintiffs brought their vehicles in for post-warranty repairs and that Defendants authorized a "secret repair" campaign to conceal the existence of the alleged defect. *See* Compl. ¶¶

201, 364. First, Plaintiff's allegations regarding Defendants' dealers' attribution of the defect to certain causes other than the alleged defect describe actions by dealers, not Defendants. Furthermore, they describe events occurring after the purchase of class vehicles and are thus insufficient to give rise to a duty to disclose at the point of purchase. Additionally, Plaintiffs nowhere provide the "who, what, when, where or how" of any alleged misrepresentation regarding the causes of timing-chain failure, as they must in order to plead a duty of disclosure at any time during their ownership of the class vehicles.

Second, Plaintiffs' claims regarding secret repairs are entirely speculative and unsupported by the particulars of any such repairs, including where they were made, when they were made, by which individuals they were made and the circumstances thereof. Such allegations plainly fail to satisfy Rule 9(b).

iv. Defendants Have Failed Adequately to Plead Reliance on A Material Omission

Omissions must be "material" in order to be actionable. Here, the concept of materiality relates to whether, coincidental with the existence of an express warranty, the absence of a reference to the timing chain system in the class vehicles' maintenance schedules could influence a reasonable consumer's decision to purchase a vehicle based on the inference that the timing chain would never malfunction or fail after the expiration of the warranty. But no reasonable consumer could possibly form such an expectation. Reasonable consumers understand that things break, wear out, or need replacement, and that automobile manufacturers do not make lifetime guarantees. *See, e.g.*, *Daugherty v. Am. Honda Motor Co.*, 51 Cal. Rptr. 3d 4th 118, 129 (Cal. Ct. App. 2006) ("[t]he only expectation buyers could have . . . [is] that [a product] would function properly for the length of [the] express warranty."). Indeed, the very existence of a repair-or-replace warranty informs Plaintiffs of the possibility that Class Vehicle components may malfunction within (let alone well after) the warranty period. Accordingly, Plaintiffs' common-law fraud claims should be dismissed.

C. Plaintiffs Cannot Maintain a Fraud Claim Because their Vehicles Outlasted the Time/Mileage Durations of their Express Warranty

Plaintiffs' common-law fraud claims also fail because Plaintiffs' vehicles outlasted their warranties. Accordingly, Plaintiffs' fraud claim, which essentially seeks to have this Court extend the NVLW, is not cognizable. *See*, *e.g.*, *Duffy v. Samsung Elecs. Am., Inc.*, 2007 U.S. Dist. LEXIS 14792, at *22, 23 (D.N.J. Mar. 2, 2007) ("[B]ecause Plaintiff's microwave continued to perform beyond the period in which Samsung was contractually bound to repair or replace any defective part, Plaintiff cannot maintain a CFA claim. To recognize Plaintiff's claim would essentially extend the warranty period beyond that to which the parties agreed."); *Noble v. Porsche Cars N. Am., Inc.*, 694 F. Supp. 2d 333, 337 (D.N.J. 2010); *Nobile v. Ford Motor Co.*, 2011 U.S. Dist. LEXIS 26766, at *15-16 (D.N.J. Mar. 14, 2011); *Perkins v. DaimlerChrysler Corp.*, 112, 890 A.2d 997, 1004 (N.J. Super. Ct. App. Div. 2006); *see also Daugherty v. Am. Honda Motor Co., Inc.*, 51 Cal. Rptr. 3d at 125; *TRG Night Hawk Ltd. v. Registry Dev. Corp.*, 17 So. 3d 782, 784 (Fla. Dist. Ct. App. 2009); *Against Gravity Apparel, Inc. v. Quarterdeck Corp.*, 699 N.Y.S.2d 368, 369 (N.Y. App. Div. 1999); *Moore v. Microsoft Corp.*, 741 N.Y.S.2d 91, 92 (N.Y. App. Div. 2002).[36]

D. Certain of Plaintiffs' Fraud Claims Are Barred by the Economic Loss Rule

Under the "economic loss" rule, a claim that a product has disappointed a customer's expectations must proceed as a breach of contract or warranty, if at all. *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871-72 (1986). Courts applying Florida, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, and South Carolina law have all expressly extended the economic loss rule to fraud claims such as Plaintiffs' arising from

[36] Nor can Plaintiffs demonstrate an unreasonable safety defect giving rise to a duty to disclose. Notably, there are no allegations in the Complaint that Plaintiffs or anyone else has ever suffered a personal injury as a result of the alleged timing chain system defect—a remarkable fact since the so-called defect is alleged to affect hundreds of thousands of vehicles. Indeed, at least one Plaintiff indicates that the manifestation of the defect is prefigured by a warning light (*see* Compl. ¶ 33), and no Plaintiff claims to have sustained so much as a fender bender as a result of any engine trouble allegedly arising from a failure of the timing chain system. Instead of providing details indicating how the alleged defect constitutes a safety hazard, Plaintiffs' counsel speculate that the failure of the timing chain while the vehicle is in operation could create safety issues, though the only Plaintiff to have experienced this specifically pleads that he brought his vehicle to a safe stop without sustaining injuries. *See* Compl. ¶ 57. Accordingly, Plaintiffs have failed to plead that the alleged defect constitutes an unreasonable risk to personal safety and cannot demonstrate a duty to disclose the alleged latent defect.

alleged intentionally fraudulent misrepresentations or omissions relating to the quality of goods.[37] Here, Plaintiffs from these states (Blanchard, Lopez, Mekbeb, A. Fleck, W. Fleck, Hosier, Haggerty, Noyes, Melman, Dieb, Panepinto, Oles, Scott, Pipe, Schaffranek and Borchino) seek recovery of pure economic loss and, accordingly, their common-law fraud claims should be dismissed.

XI. PLAINTIFFS' NEGLIGENT MISREPRESENTATION CLAIMS MUST BE DISMISSED

Plaintiffs' negligent misrepresentation claims fail for several reasons, depending on the laws of relevant states. In Arkansas, negligent misrepresentation is not even a recognized cause of action.[38] In numerous other relevant states, a claim of negligent misrepresentation requires an express, positive false statement, and thus cannot be premised on omission.[39] Even where they are not barred, negligent omission claims can be maintained only where the parties are in a "special relationship."[40] The required relationship must in all cases be far closer than that of a remote seller and purchaser.

---

[37] *See Burns v. Winnebago Indus., Inc.*, 2013 U.S. Dist. LEXIS 116377, at *9 (M.D. Fla. Aug. 16, 2013); *Murphy v. P&G*, 695 F. Supp. 2d 600, 602 (E.D. Mich. 2010); *In re Elk Cross Timbers Decking Mktg., Sales Practices & Prods. Liab. Litig.*, 2015 U.S. Dist. LEXIS 144790, at *73-74 (D.N.J. Oct. 26, 2015) (Linares, J.) (applying New Hampshire law); *Park v. Inovio Pharms., Inc.*, 2016 U.S. Dist. LEXIS 24993, at *4-6 (D.N.J. Mar. 1, 2016); *Orlando v. Novurania of Am., Inc.*, 162 F. Supp. 2d 220, 225-26 (S.D.N.Y. 2001); *Malone v. Tamko Roofing Prods.*, 2013 U.S. Dist. LEXIS 145530, at *6 (W.D.N.C. Oct. 8, 2013); *Galoski v. Stanley Black & Decker, Inc.*, 2015 U.S. Dist. LEXIS 114663, at **19-21 (N.D. Ohio Aug. 28, 2015); *Sabol v. Ford Motor Co.*, 2015 U.S. Dist. LEXIS 92341, at *17 (E.D. Pa. July 16, 2015); *Sapp v. Ford Motor Co.*, 687 S.E.2d 47, 49 (S.C. 2009).

[38] *South County, Inc. v. First W. Loan Co.*, 871 S.W.2d 325, 326 (Ark. 1994).

[39] *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.*, 68 Cal. Rptr. 3d 828, 847 (Cal. Ct. App. 2007) ("The tort requires a 'positive assertion[.]' . . . 'An "implied" assertion or representation is not enough.") (citations omitted); *see* Cal. Civ. Code, § 1572 (2); *Scott v. Honeywell Int'l Inc.*,

As reflected in Section X.B.i, *supra*, Courts in this District have uniformly distinguished the relationship between an automobile manufacturer and a remote purchaser from the type of "special relationship" that can give rise to a fraud claim.

Lastly, other than in Texas and Kansas, the economic loss rule bars suits for economic damages based on tort theories, such as negligent misrepresentation. *See E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871-72 (1986).[41]

2015 U.S. Dist. LEXIS 42194, at *38 n.10 (D. Colo. Mar. 30, 2015); *Lautzenhiser v. Coloplast A/S*, 2012 U.S. Dist. LEXIS 142657, at *18 (S.D. Ind. Sep. 29, 2012); *Krieger v. Gast*, 2000 U.S. Dist. LEXIS 3097, at *44 (W.D. Mich. Jan. 21, 2000); *Breeden v. Richmond Community College*, 171 F.R.D. 189, 202-03 (M.D.N.C. 1997); *White v. Guarente*, 372 N.E.2d 315, 319 (N.Y. 1977); *Newby v. Enron Corp.*, 540 F. Supp. 2d 800, 810 (S.D. Tex. 2007); *Encore D.E.C., LLC v. APES I, LLC*, 2015 U.S. Dist. LEXIS 110412, at *19 (W.D. Wash. Aug. 20, 2015).

[40] *E.g.*, *Fanion v. Radei*, 2009 Conn. Super. LEXIS 2675, at *23 (Conn. Super. Ct. Oct. 16, 2009); *Kahama VI, LLC v. HJH, LLC*, 2013 U.S. Dist. LEXIS 174032, at *16 (M.D. Fla. Dec. 12, 2013); *Meschke v. Orthalliance, Inc.*, 2002 U.S. Dist. LEXIS 11620, at *3 (D. Kan. June 24, 2002); *In re Target Corp. Customer Data Sec. Breach Litig.*, 64 F. Supp. 3d 1304, 1310-11 (D. Minn. 2014); *Weinstein v. Mortg. Capital Assocs.*, 2011 U.S. Dist. LEXIS 2770, at *21 (D. Nev. Jan. 11, 2011); *Boardakan Rest. LLC v. Gordon Grp. Holdings, LLC*, 2016 U.S. Dist. LEXIS 147298, at *74 (E.D. Pa. Oct. 21, 2016); *Argabright v. Rheem Mfg. Co.*, 2016 U.S. Dist. LEXIS 108478, at *48 (D.N.J. Aug. 15, 2016).

[41] *See also In re Elk Cross Timbers Decking Mktg., Sales Practices & Prods. Liab. Litig.*, 2015 U.S. Dist. LEXIS 144790, at *70-74 (D.N.J. Oct. 26, 2015) (Linares, J.) (applying California, Illinois, and Michigan law); *Ulbrich v. Groth*, 78 A.3d 76, 94 (Conn. 2013); *Aprigliano v. Am. Honda Motor Co.*, 979 F. Supp. 2d

Thus, where a fraud claim concerning the quality of goods is interwoven with a breach of warranty claim, plaintiff's recourse is in contract or warranty, not tort.

XII. PLAINTIFFS' UNJUST ENRICHMENT CLAIMS FAIL

Unjust enrichment is an equitable remedy, which cannot be asserted where the plaintiff has an adequate remedy at law, such as through fraud or warranty claims. *See, e.g., In re Ford Tailgate Litig.*, 2014 U.S. Dist. LEXIS 119769, *12-17 & n.3 (N.D. Cal. Aug. 8, 2014) (dismissing unjust enrichment claims arising out of an alleged latent defect under the laws of, among other states, Connecticut, Florida, Georgia, Illinois, Indiana, Maryland, New Hampshire, New York, North Carolina, Ohio, and Pennsylvania due to the existence of adequate legal remedies);

1331, 1337-38 (S.D. Fla. 2013); *Long v. Jim Letts Oldsmobile, Inc.*, 217 S.E.2d 602, 604-05 (Ga. Ct. App. 1975); *Rollander Enters. v. H.C. Nutting Co.*, 2011 Ind. App. Unpub. LEXIS 926, at *26-27 (Ind. Ct. App. July 8, 2011); *Rotorex Co., Inc. v. Kingsbury Corp.*, 42 F. Supp. 2d 563, 575 (D. Md. 1999); *Marvin Lumber and Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 885 (8th Cir. 2000) (applying Minnesota law); *CH2E Nev., LLC v. Mahjoob*, 2015 U.S. Dist. LEXIS 143068, at *9-11 (D. Nev. Oct. 21, 2015); *Bowser v. MTGLQ Investors, LP*, 2015 U.S. Dist. LEXIS 105967, at *12-14 (D.N.H. 2015); *Demorato v. Carver Boat Corp.*, 2007 U.S. Dist. LEXIS 35758, at *29-30 (D.N.J. May 16, 2007); *Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 297 (S.D.N.Y. 2015); *LRP Hotels of Carolina, LLC v. Westfield Ins. Co.*, 2014 U.S. Dist. LEXIS 154909, at *11-14 (E.D.N.C. Oct. 31, 2014); *Trgo v. Chrysler Corp.*, 34 F. Supp. 2d 581, 595 (N.D. Ohio 1998); *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 670-82 (3d Cir. 2002) (applying Pennsylvania law); *Besley v. FCA US LLC*, 2016 U.S. Dist. LEXIS 2200, at *10-15 (D.S.C. Jan. 8, 2016); *Griffith v. Centex Real Estate Corp.*, 969 P.2d 486, 490-91 (Wash. Ct. App. 1998).

Coghlan v. Wellcraft Marine Corp., 240 F.3d 449, 454 (5th Cir. 2001) ("An express contract governed the Coghlans' purchase of their boat, and no implied or quasi-contract will be found where an express contract exists.").[42]

Moreover, where an unjust enrichment cause of action is predicated on wrongful conduct that supplies the gravamen of alternate causes of action, dismissal of the alternate causes of action requires dismissal of the unjust enrichment claim as well since any benefit was not "unjust." *See Ebner v. Fresh, Inc.*, 2016 U.S. App. LEXIS 4875, *17-18 (9th Cir. Mar. 17, 2016); *Baldwin v. Star Sci., Inc.*, 2016 U.S. Dist. LEXIS 11952, *37-39 (N.D. Ill. Feb. 2, 2016).

In addition, in some jurisdictions there must be a sufficient "direct benefit" to the defendant to sustain an unjust enrichment claim, such that courts have dismissed consumers' unjust enrichment claims against remote manufacturers and distributors, even where the purchase was made from an authorized retailer. *See, e.g.*, *Bedi v. BMW of N. Am.*, LLC, 2016 U.S. Dist. LEXIS 9365, at *14-15 (D.N.J. Jan. 27, 2016); *In re Ford Motor Co. E-350 Van Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 68241, at *54-55, 97-99, 169-70 (D.N.J. July 9, 2010).[43]

---

[42] *See also Jarrett v. Panasonic Corp. of N. Am.*, 8 F. Supp. 3d 1074, 1086 (E.D. Ark. 2013) (no claim where express contract); *Martin v. Ford Motor Co.*, 292 F.R.D. 252, 280 (E.D. Pa. 2013) (noting law in California) (no claim where other legal remedies available); *Francis v. Mead Johnson & Co.*, 2010 U.S. Dist. LEXIS 137630, at *27-28 (D. Colo. Dec. 17, 2010) (no claim where other legal remedies available) *Deeds v. Waddell & Reed Inv. Mgmt. Co.*, 280 P.3d 786, 795 (Kan. Ct. App. 2012) (no claim where other legal remedies available); *Herman v. Bridgewater Park Apts.*, 2016 U.S. Dist. LEXIS 29569, at *13-14 (E.D. Mich. Mar. 3, 2016) (no claim where express contract); *In re Viagra Prods. Liab. Litig.*, 658 F. Supp. 2d 950, 969 (D. Minn. 2009) (no claim where other legal remedies available); *Jensen Enters., Inc. v. Poisson Communs., Inc.*, 2013 U.S. Dist. LEXIS 128948, at *8 (D. Nev. Sept. 6, 2013) (no claim where express contract); *Chiarelli v. Nissan North Am., Inc.*, 2015 U.S. Dist. LEXIS 129416, at *56-58 (E.D.N.Y. 2015) (noting New Jersey law) (no claim where express contract); *Klinger v. Wells Fargo Bank, NA*, 2010 U.S. Dist. LEXIS 111683, at *16 (W.D. Wash. Oct. 20, 2010) (no claim where express contract).

Moreover unjust enrichment is only viable where the defendant has received a gratuitous benefit, not where there has been an exchange of benefits, and thus a claim for unjust enrichment is not available simply when "the defendant has profited unscrupulously while the plaintiff has been harmed." *In re Zappos.com, Inc.*, 2013 U.S. Dist. LEXIS 128155, at *19-21 (D. Nev. Sept. 9, 2013).

Here, Plaintiffs have available legal remedies, fail to plead alternative causes of action demonstrating unjust gains by VWGoA, and fail to allege a direct or gratuitous benefit to VWGoA, requiring dismissal of their unjust enrichment claim.

---

43 *See also Berlinger v. Wells Fargo, N. A.*, 2015 U.S. Dist. LEXIS 141111, at *44 (M.D. Fla. Oct. 16, 2015); *Peterson v. Aaron's, Inc.*, 2015 U.S. Dist. LEXIS 123320, at *5-6 (N.D. Ga. Sept. 15, 2015); *In re Ford Motor Co. E-350 Van Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 68241, at *71-72 (D.N.J. July 9, 2010) (applying Illinois law); *In re Aftermarket Filters Antitrust Litig.*, 2010 U.S. Dist. LEXIS 32652, at *18-20 (N.D. Ill. Apr. 1, 2010) (applying Kansas and Michigan law); *Bedi v. BMW of N. Am., LLC*, 2016 U.S. Dist. LEXIS 9365, at *15 (D.N.J. Jan. 27, 2016); *In re Refrigerant Compressors Antitrust Litig.*, 2013 U.S. Dist. LEXIS 50737, at *80-82 (E.D. Mich. Apr. 9, 2013) (noting New York law); *Kunzelmann v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 3962, at *31 (S.D. Fla. Jan. 10, 2013) (noting North Carolina and South Carolina law); *Savett v. Whirlpool Corp.*, 2012 U.S. Dist. LEXIS 124086, at *19-20 (N.D. Ohio Aug. 31, 2012); *Schmidt v. Ford Motor Co.*, 972 F. Supp. 2d 712, 721-22 (E.D. Pa. 2013); *Copeland v. Albion Labs., Inc.*, 2015 U.S. Dist. LEXIS 154757, at *12 (W.D. Wash. Nov. 16, 2015) (applying Texas law).

Additionally, Texas does not recognize unjust enrichment as a viable cause of action. *See Steele v. Johnson & Johnson*, 2015 U.S. Dist. LEXIS 144548, at *10 (N.D. Tex. Oct. 23, 2015). Therefore, Plaintiff Kane's claims must be dismissed.

XIII. PLAINTIFFS' STATUTORY CONSUMER FRAUD CLAIMS FAIL

Plaintiffs also attempt to invoke the consumer protection statutes of 22 states. These claims sound exclusively in fraud, based on alleged misrepresentations and omissions in VWGoA's manuals and maintenance schedules, as well as other alleged acts that Plaintiffs conclusorily characterize as deceptive. As explained below, these claims fail on multiple grounds.

A. Plaintiffs' Claims Under Consumer Protection Statutes Of Twenty States Fail To Satisfy Rule 9(B) And Must Be Dismissed (Counts VIII-XIII, XV-XXIV, XXVI-XXVII, and XXIX-XXXIV)

Courts have applied Rule 9(b) to claims under the consumer protection statutes of Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Maryland, Michigan, Minnesota,[44] Nevada, New Hampshire, New Jersey, North Carolina, Pennsylvania, Ohio, South Carolina, Texas, and Washington.[45]

---

[44] Plaintiff's claim pursuant to Minnesota's Private Attorney General Statute (Count XXV) is the procedural mechanism through which he seeks relief under the Minnesota Uniform Deceptive Trade Practices Act (the "MUDTPA"). Absent a well-pleaded claim under the latter statute, a claim under the Private Attorney General Statute is devoid of substance and must be dismissed.

[45] *Jarrett v. Panasonic Corp. of N. Am.*, 8 F. Supp. 3d 1074, 1085-86 (E.D. Ark. 2013); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009)

Further, Georgia courts have acknowledged that claims under Georgia's Fair Business Practices Act (the "GFBPA") sound in fraud (*Zeeman v. Black*, 273 S.E.2d 910, 916 (Ga. Ct. App. 1980) (construing the GFBPA to incorporate "the 'reliance' element of the common law tort of misrepresentation"), and courts have applied Rule 9(b) to statutes similar to Georgia's Uniform Deceptive Trade Practices Act (the "GUDTPA"). *See, e.g.*, *Nakajima All Co. v. SL Ventures, Corp.*, 2001 U.S. Dist. LEXIS 7535, at *16 (N.D. Ill. May 31, 2001). Rule 9(b) thus

---

(applying California law); *Hansen v. Auto-Owners Ins. Co.*, 2010 U.S. Dist. LEXIS 25431, at *7-8 (D. Colo. Mar. 4, 2010); *In re Trilegiant Corp.*, 11 F. Supp. 3d 82, 120 (D. Conn. 2014); *Stires v. Carnival Corp.*, 243 F. Supp. 2d 1313, 1322 (M.D. Fla. 2002); *Chi. Male Med. Clinic, Inc. v. Ultimate Mgmt.*, 2012 U.S. Dist. LEXIS 183257, at *6, 15 (N.D. Ill. Dec. 28, 2012); *Young v. Harbor Motor Works, Inc.*, 2008 U.S. Dist. LEXIS 111909, at *17 (N.D. Ind. Dec. 18, 2008); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1524 (D. Kan. 1995); *Spaulding v. Wells Fargo Bank, N.A.*, 920 F. Supp. 2d 614, 622 (D. Md. 2012); *Home Owners Ins. Co. v. ADT LLC*, 109 F. Supp. 3d 1000, 1008-09 (E.D. Mich. 2015); *Tuttle v. Lorillard Tobacco Co.*, 118 F. Supp. 2d 954, 963 (D. Minn. 2000); *Chattem v. BAC Home Loan Servicing LP*, 2012 U.S. Dist. LEXIS 78412, at *6 (D. Nev. June 5, 2012); *Gwyn v. Loon Mountain Corp.*, 2002 U.S. Dist. LEXIS 9092, at *24-25 (D.N.H. May 15, 2002); *Naporano Iron & Metal Co. v. Am. Crane Corp.*, 79 F. Supp. 2d 494, 511 (D.N.J. 1999); *Smith v. Cent. Soya of Athens, Inc.*, 604 F. Supp. 518, 529 (E.D.N.C. 1985); *Ferron v. SubscriberBase Holdings, Inc.*, 2009 U.S. Dist. LEXIS 23583, at *18-19 (S.D. Ohio Mar. 10, 2009); *Taggart v. Wells Fargo Home Mortg., Inc.*, 563 F. App'x 889, 892 (3d Cir. 2014) (applying Pa. law); *Meadow v. NIBCO, Inc.*, 2016 U.S. Dist. LEXIS 68903, at *20 (M.D. Tenn. May 24, 2016) (applying South Carolina law); *Patel v. Holiday Hosp. Franchising, Inc.*, 172 F. Supp. 2d 821, 825 (N.D. Tex. 2001); *Goodman v. HTC Am., Inc.*, 2012 U.S. Dist. LEXIS 88496, at *44-45 (W.D. Wash. June 26, 2012).

should also apply to Plaintiff Smith's GFBPA and GUDTPA claims. Accordingly, each of these jurisdictions requires Plaintiffs to plead the alleged misrepresentations, omissions or deceptive acts with *particularity*.

For the reasons stated in Section X.A, *supra*, the Complaint fails to set forth the particulars of any misrepresentation alleged to have been made by VWGoA related to the class vehicles, let alone the timing chain system, as it must in order to satisfy Rule 9(b). Indeed, the Complaint fails to plead facts demonstrating that any defect manifested in the class vehicles within their express warranty periods, and in fact contains allegations establishing that the class vehicles' timing chain systems, as well as the class vehicles themselves, performed exactly as warranted within these periods, foreclosing any misrepresentation claims. Accordingly, Plaintiffs have failed to plead a misrepresentation by Defendants at all, let alone with sufficient particularity to support a consumer fraud claim.

Further, and also as demonstrated in Section X.B, *supra*, Plaintiffs have failed to plead with particularity that Defendants fraudulently omitted information that they were under a duty to disclose. Accordingly, the claims of Plaintiffs Stockalper, Nadiri, Piumarta, Swihart, Haggerty, Zhao, Pipe, Shaffranek, and Ellahie should be dismissed under the law of Arkansas, California, Minnesota, and

Pennsylvania, all of which require a duty to disclose to support statutory consumer fraud claims based on omissions.[46]

Further, to the extent that the consumer protection statutes at issue either do not require plaintiffs to plead facts demonstrating a duty to disclose or apply different standards for imposing a duty of disclosure than under common law, they nonetheless require Plaintiffs to plead at least that the defendant was aware of the allegedly omitted information, which Plaintiffs have failed to do as explained in Section X.B.iii.1., *supra*.[47]

---

46 *See Perez v. Volkswagen Grp. of Am.*, 2013 U.S. Dist. LEXIS 54845, at *30 (W.D. Ark. Apr. 17, 2013); *Herron v. Best Buy Co.*, 924 F. Supp. 2d 1161, 1175 (E.D. Cal. 2013); *Graphic Communs. Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp.*, 850 N.W.2d 682, 696 (Minn. 2014); *Wilcox v. State Farm Fire & Cas. Co.*, 2015 U.S. Dist. LEXIS 26924, at **17-18 (D. Minn. Jan. 15, 2015); *Silverstein v. Percudani*, 2005 U.S. Dist. LEXIS 10005, at *24 (M.D. Pa. May 26, 2005).

47 *See*, *e.g.*, Colo. Rev. Stat. § 6-1-105(1)(u) (An omission is a deceptive trade practice only if the defendant failed to "disclose material information . . . which information was *known* at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction.") (emphasis added); *Matthews v. Am. Honda Motor Co.*, 2012 U.S. Dist. LEXIS 90802, at *7-8 (S.D. Fla. June 6, 2012); *Rockford Memorial Hosp. v. Havrilesko*, 858 N.E.2d 56, 62 (Ill. App. Ct. 2006); Ind. Code § 24-5-0.5-2(8) (requiring "intent to defraud or mislead"); Kan. Stat. Ann. § 50-626; Md. Code Ann., Com. Law § 13-301(9); *In re Carrier IQ, Inc., Consumer Privacy Litig.*, 78 F. Supp. 3d 1051, 1121 (N.D. Cal. 2015) (observing that the language of Michigan's Consumer Protection Act "imposes an affirmative duty on defendants to disclose a material fact when that fact is in the exclusive knowledge of the defendant"); *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 605 (N.J. 1997); *Kelton v. Hollis Ranch, LLC*, 927 A.2d 1243, 1246 (N.H. 2007); Nev. Rev. Stat. § 598.0923 (Nevada statute requiring knowledge); *Patterson v. McMickle*, 191

Finally, Plaintiffs' further allegations of deceptive conduct—alleged "secret repairs" and alleged misrepresentations by dealers regarding the cause of the alleged defect—are entirely speculative and are unsupported by details providing the "who," "what," "when" or "how" of such conduct—let alone conduct by Defendants (as opposed to their dealers)—as they must to satisfy Rule 9(b).

Accordingly, Plaintiffs' consumer fraud claims must be dismissed to the extent asserted under the law of jurisdictions that apply Rule 9(b) to such claims.

B. Plaintiffs' Consumer Protection Claims Fail Under the Law of Eighteen States Because They Fail to Allege Practices Likely to Deceive Ordinary Consumers (Counts VIII-XIX, XXI-XXII, XXVIII-XXXII, and XXXIV

Courts interpreting the state consumer protection statutes of Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Maryland, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas and Washington either require plaintiffs to plead subjective reasonable reliance on alleged deceptive acts or determine whether a particular practice is deceptive according to its objective tendency to deceive "reasonable," "ordinary" or "average" consumers.[48] Here, for the reasons set forth in Section IX

S.W.3d 819, 827 (Tex. App. 2004); *Bain v. Metro. Mortg. Grp., Inc.*, 2010 U.S. Dist. LEXIS 22690, at *16 (W.D. Wash. Mar. 11, 2010).

[48] *Jarrett v. Panasonic Corp. of N. Am.*, 8 F. Supp. 3d 1074, 1085-86 (E.D. Ark. 2013) (subjective standard); *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (applying California law); *Rhino Linings United States v. Rocky Mt. Rhino Lining*, 62 P.3d 142, 148 n.11 (Colo. 2003); *DTI Enters., LLC v. Cardiology*

and X.B.iii.2, *supra*, Plaintiffs have failed adequately to plead the existence of, let alone reliance on, misrepresentations, omissions or other deceptive acts by VWGoA. Further, as established in Section X.B.iv., *supra*, the only reasonable expectation that any consumer could have regarding the class vehicles was that they would be repaired at no charge to the consumer if a manufacturing defect manifested during the express warranty period. In light of the durational limitations of the NVLWs, Plaintiffs cannot plausibly allege that the maintenance schedule would deceive reasonable consumers into believing that the timing chain system would last the entire lifetime of the car. *See, e.g.*, *Daugherty v. Am. Honda Motor Co.*, 51 Cal. Rptr. 3d 118, 129 (Cal. Ct. App. 2006) ("The only expectation buyers could have . . . [is] that [a product] would function properly for the length

---

Assocs. of Derby, P.C., 2014 Conn. Super. LEXIS 276, at *7 (Conn. Super. Ct. Feb. 4, 2014); *Zlotnick v. Premier Sales Grp., Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007) (applying Florida law); *Zeeman v. Black*, 273 S.E.2d 910, 916 (Ga. Ct. App. 1980) (subjective standard); *Ibarrola v. Kind, LLC*, 2014 U.S. Dist. LEXIS 95833, at *16 (N.D. Ill. July 14, 2014); *AFSCME v. Cephalon, Inc.*, 790 F. Supp. 2d 313, 323 (E.D. Pa. 2011) (interpreting Indiana statute) (subjective standard); *Green v. Wells Fargo Bank, N.A.*, 927 F. Supp. 2d 244, 253 (D. Md. 2013) (subjective standard); *Lackowski v. Twinlab Corp.*, 2001 U.S. Dist. LEXIS 25633, at *19 (E.D. Mich. Dec. 21, 2001); *Quigley v. Esquire Deposition Services, LLC*, 975 A.2d 1042, 1047 (N.J. Super. Ct. App. Div. 2009); *U.S. Bank Nat'l. Assn. v. Pia*, 901 N.Y.S.2d 104, 106 (N.Y. App. Div. 2010); *Deluca v. River Bluff Holdings II, LLC*, 2015 NCBC 11, P47 (N.C. Super. Ct. 2015) (subjective standard); *Davis v. Byers Volvo*, 2012-Ohio-882, ¶ 35 (Ohio Ct. App. 2012); *Smith v. Ditech Fin.*, 2016 U.S. Dist. LEXIS 164425, at *18 (M.D. Pa. Nov. 28, 2016) (subjective standard); *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms.*, 777 S.E.2d 176, 195-96 (S.C. 2015) (subjective standard); *TIG Ins. Co. v. James*, 184 F. Supp. 2d 591, 605 n.17 (S.D. Tex. 2001) (subjective standard); *Behnke v. Ahrens*, 294 P.3d 729, 736 (Wash. Ct. App. 2012).

of [the] express warranty."). Accordingly, the consumer fraud claims of Plaintiffs Stockalper, Swihart, Piumarta, Nadiri, Ellahie, Lemoine, Serbia, Molwitz, Gaudet, Blanchard, Lopez, Mekbeb, the Flecks, Smith, Calihan, Sensnovis, Johnson, Hosier, Haggerty, Zimand, Drake, Melman, Deib, Panepinto, Oles, Scott, Pipe, Schaffranek, Borchino and Gossman should be dismissed.

C. Certain Plaintiffs' Consumer Fraud Claims Under the Laws of Arkansas and New York Should Be Dismissed for Failure to Plead an Injury Other Than Diminution of the Value of Their Vehicles (Counts IX and XXVIII)

Neither Arkansas nor New York recognizes consumer fraud claims based on alleged diminution in value due to the risk that an alleged "latent defect" may someday manifest itself. Rather, in these jurisdictions Plaintiffs must allege an actual injury. *See Wallis v. Ford Motor Co.*, 208 S.W.3d 153, 161 (Ark. 2005) ("under Ark. Code Ann. § 4-88-113(f), a private cause of action is afforded to any person who suffers actual damages or injury," but "[w]here the only alleged injury is the diminution in the value of the product, a private cause of action is not cognizable under the ADTPA"); *Frank v. DaimlerChrysler Corp.*, 741 N.Y.S.2d 9, 12-13 (N.Y. App. Div. 2002). Plaintiffs Stockalper and Melman do not claim that the timing chain systems in their class vehicles have malfunctioned and have not incurred any expenses. Rather, they claim that, due to the existence of a "latent defect," their vehicles are "subject to sudden, unexpected failure of the Timing

Chain System at any time." Compl. ¶¶ 23 & 25. These allegations do not state consumer fraud claims under Arkansas or New York law.

D. Plaintiffs' Omission-Based Claims Should Be Dismissed Under Georgia's Uniform Deceptive Trade Practices Act and Indiana's Deceptive Consumer Sales Act, Which Do Not Recognize Consumer Fraud Omissions Claims (Counts XVI and XIX)

Plaintiffs cannot state claims under Georgia's Uniform Deceptive Trade Practices Act (the "GUDTPA") or Indiana's Deceptive Consumer Sales Act (the "IDCSA"). Viable claims under both of these statutes require an affirmative misrepresentation and cannot be maintained based on omissions. *See Energy Four, Inc. v. Dornier Med. Systems, Inc.*, 765 F. Supp. 724, 731 (N.D. Ga. 1991) (absent an affirmative representation that is "misleading, partially incorrect, or untrue," the "mere failure to disclose is not actionable."); *Lawson v. Hale*, 902 N.E.2d 267, 274 (Ind. Ct. App. 2009) ("Indiana Code section 24-5-0.5-3(a)…does not apply to non-disclosures."). Here, Plaintiffs Smith and Johnson have failed to plead any misrepresentation by Defendants and, accordingly, their GUDTPA and IDCSA claims must be dismissed.

E. Classwide Claims for Damages Are not Allowed Under Colorado's Consumer Protection Act, Georgia's Fair Business Practices Act or South Carolina's Unfair Trade Practices Act (Counts XII, XVII, and XXXII)

Colorado, Georgia and South Carolina do not permit plaintiffs to bring class claims for money damages under the Colorado Consumer Protection Act

("CCPA"), Georgia Fair Business Practices Act ("GFBPA") or South Carolina Unfair Trade Practices Act ("SCUTPA"), respectively. Colo. Rev. Stat. § 6-1-101 *et seq.*; *Martinez v. Nash Finch Co.*, 886 F. Supp.2d 1212, 1218 (D. Colo. 2012); S.C. Code Ann. § 39-5-140[a]); Ga. Code Ann. § 10-1-399. Accordingly, the CCPA, GFBPA, and SCUTPA claims should be dismissed to the extent that they seek damages arising out of class claims.

F. Plaintiffs Impermissibly Seek Money Damages Under Three Consumer Protection Statues that Only Permit Equitable Relief for Such Claims (Counts X, XVI, and XXIV)

Plaintiffs' claims pursuant to California's Unfair Competition Law (the "UCL"), Georgia's Uniform and Deceptive Trade Practices Act (the "GUDTPA") and Minnesota's Uniform Deceptive Trade Practices Act (The "MUDTPA") must be dismissed to the extent that they purport to seek money damages, as those statutes only provide for equitable relief. *See Philips v. Ford Motor Co.*, 2015 U.S. Dist. LEXIS 88937, at *52 (N.D. Cal. July 7, 2015); Ga. Code. Ann. § 10-1-373; *Dering v. Serv. Experts Alliance LLC*, 2007 U.S. Dist. LEXIS 89972, at *30 (N.D. Ga. Dec. 6, 2007); *Simmons v. Modern Aero, Inc.*, 603 N.W.2d 336, 340 (Minn. Ct. App. 1999). Moreover, equitable relief is foreclosed by Plaintiffs' admission that legal remedies are available to them. *See, e.g.*, *Durkee v. Ford Motor Co.*, 2014 U.S. Dist. LEXIS 122857, at *6 (N.D. Cal. Sep. 2, 2014); *Allen v. De Bello*, 2016 U.S. Dist. LEXIS 55900, at *45 (D.N.J. Apr. 27, 2016) ("[A] claim for injunctive relief must fail where plaintiffs cannot demonstrate that they have no adequate remedy at law.”). Accordingly, the claims of Plaintiffs Nadiri, Piumarta, Swihart and Ellahie, Smith and Zhao under these three statutes must be dismissed.

Further, Plaintiffs face no risk of future harm and may not seek an injunction under any of these statutes—“‘the remedy by injunction is to prevent, prohibit or protect from future wrongs and does not afford a remedy for what is past.’” *Catrett v. Landmark Dodge, Inc.*, 560 S.E.2d 101, 106 (Ga. Ct. App. 2002) (citation omitted). Here, Plaintiffs fail to allege any basis for any injunctive relief, as they specifically plead that they have already experienced the defect and repaired their vehicles’ timing chain systems (Compl. ¶¶ 27-29, 38, 44 & 62). This forecloses injunctive relief under the UCL, GUDTPA or MUDTPA.

G. Plaintiffs’ Consumer Fraud Claims are Barred by the Economic Loss Doctrine under the Law of Four States (Counts VIII, XXII, XXIX, and XXXI)

The economic loss rule bars Plaintiffs’ claims under the consumer protection statutes of Michigan, New Jersey, North Carolina, and Pennsylvania. *See Deem v. Mi Windows & Doors Inc.*, 2012 U.S. Dist. LEXIS 149756, at *9 (D.S.C. Oct. 18, 2012) (applying Michigan law); *Farash & Robbins, Inc. v. Fleet Nat'l Bank*, 2005 U.S. Dist. LEXIS 33810, at *16 (D.N.J. Dec. 16, 2005); *In re Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prods. Liab. Litig.*, 2013 U.S. Dist. LEXIS 7009, at **25-26 (D.S.C. Jan. 16, 2013) (applying North Carolina law); *Werwinski* *v. Ford Motor Co.*, 286 F.3d 661, 681 (3d Cir. 2002) (applying Pennsylvania law). As explained, *supra*, Plaintiffs Haggerty, Drake, Zimand, Oles, Pipe and Schaffranek's claims for pure economic loss are duplicative of contract-based claims and, accordingly, should be dismissed.

H. Plaintiffs' Claims Under Connecticut Law Must Be Dismissed for Independent Reasons (Counts XIII and XIV)

Connecticut's Product Liability Act, Conn. Gen. Stat. § 52-572m-q (the "CPLA") states that a plaintiff who asserts a product liability claim may assert no other claim: "A product liability claim . . . ***shall be in lieu of all other claims*** against product sellers … for harm caused by a product." *Id.* § 52-572n(a) (emphasis added). The CPLA is thus "the exclusive means by which a party may secure a remedy for an injury caused by a defective product." *Hurley v. Heart Physicians, P.C.*, 898 A.2d 777, 788 (Conn. 2006). The explicit purpose of this statute is to "cut down on the number of counts in a complaint for injuries caused by a product." *Winslow v. Lewis-Shepard, Inc.*, 562 A.2d 517, 520 (Conn. 1989). Thus, where a CPLA claim is asserted, all non-CPLA claims must be dismissed.

Plaintiffs Serbia, Molwitz and Gaudet assert a product liability claim as defined by the CPLA. Accordingly, the Court should dismiss *all* of their other claims—including, but not limited to, their claim under Connecticut's Unfair Trade Practices Act (the "CUTPA")—to the extent asserted under Connecticut law. *See*

Gagner v. Chrysler Corp., 1994 Conn. Super. LEXIS 3093, at *7 (Conn. Super. Ct. Dec. 5, 1994) (applying the CPLA to bar Plaintiffs' CUTPA claim).

Further, Plaintiffs' CPLA claim is itself subject to dismissal because Plaintiffs cannot assert a claim under the CPLA without articulating a viable theory upon which they are entitled to recovery. The CPLA merely recasts "'an existing cause of action and [does] not creat[e] a wholly new right for claimants harmed by a product.'" *Elliot v. Sears, Roebuck & Co.*, 642 A.2d 709, 711 (Conn. 1994) (citation omitted). Accordingly, the CPLA provides a non-exhaustive list of theories under which a Plaintiff might bring a CPLA claim, including "breach of warranty, express or implied" Conn. Gen. Stat. § 52-572m. Thus, a products liability action is merely a label applied to a variety of theories. Here, Plaintiffs allege that Defendants violated the CPLA due to breach of express and implied warranties—claims that have been shown to be unviable in Sections V and VI, *supra*. Accordingly, the CPLA claim should be dismissed.

I. Plaintiffs' Claims under the NJCFA, UCL and CLRA Should Be Dismissed for Independent Reasons (Counts VIII and X-XI)

Under New Jersey's Consumer Fraud Act and California's Unfair Competition Law and Consumer's Legal Remedies Act, where a vehicle component has outperformed its warranty period, a consumer fraud claim will not lie. *See, e.g.*, *Noble v. Porsche Cars N. am., Inc.*, 694 F. Supp. 2d 333, 337 (D.N.J. 2010) ("[A] plaintiff cannot maintain an action under New Jersey's CFA when the only allegation is that the defendant provided a part—alleged to be substandard—that outperforms the warranty provided.") (quotations and citation omitted); *Nobile v. Ford Motor Co.*, 2011 U.S. Dist. LEXIS 26766, at *15-16 (D.N.J. Mar. 14, 2011); *Duffy v. Samsung Elecs. Am., Inc.*, 2007 U.S. Dist. LEXIS 14792, at *22, 23 (D.N.J. Mar. 2, 2007); *see also Ostreriecher v. Alienware Corp.*, 544 F.Supp.2d 964, 969-973 (N.D. Cal. 2008); *Daughertyv. Am. Honda Motor Co.*, 51 Cal. Rptr. 3d 118, 125-28 (Cal. Ct. App. 2006); *Bardin v. DaimlerChrysler Corp.*, 39 Cal. Rptr. 3d 634, 647-48 (Cal. Ct. App. 2006).

Plaintiffs' alleged safety concerns are of no moment, as courts in this district have concluded that a product that outperforms its warranty cannot give rise to a consumer fraud claim despite alleged safety concerns. *See Noble*, 694 F. Supp. 2d at 337; *Duffy*, 2007 U.S. Dist. LEXIS 14792, at *21-23; *Nobile*, 2011 U.S. Dist. LEXIS 26766, at *15-17. Moreover, as discussed, *supra* n. 36, Plaintiffs have failed to plausibly plead a safety defect, as they must in order to satisfy applicable pleading standards.

Accordingly, Plaintiffs Nadiri, Swihart, Piumarta, Ellahie, Drake and Zimand's consumer fraud claims should be dismissed.

J. Plaintiffs Scott's Class Claims Under Ohio's Consumer Sales Protection Act Must Be Dismissed (Count XXX)

In both federal and state court, consumers may not seek relief under the Ohio's Consumer Sales Protection Act (the "OCSPA") in a class action unless the "defendant was sufficiently on notice that its conduct was deceptive or unconscionable under the statute at the time it committed the alleged acts." *In Re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liab. Litig.*, 880 F. Supp. 2d 801, 868 (S.D. Ohio 2012) (citing Ohio. Rev. Code § 1345.09(B)). Thus, under the OCSPA, "Plaintiffs bringing claims on behalf of a class must demonstrate that either (1) the alleged violation is an act or practice that was declared to be deceptive or unconscionable by a rule adopted by the Attorney General before the consumer transaction on which the action is based, or (2) the alleged violation is an act or practice that was determined by a court to violate the OCSPA and the court's decision was available for inspection before the transaction took place." *In Re Porsche Cars N. Am.*, 880 F. Supp. 2d, at 868.

The defendant's alleged OCSPA violation must be "substantially similar to an act or practice previously declared to be deceptive" under the OCSPA. *Marrone v. Philip Morris USA, Inc.*, 850 N.E. 2d 31, 33 (Ohio 2006). Furthermore, a "general rule [that does not refer to any particular act or practice] is not sufficient to put a reasonable person on notice of the prohibition against a specific act or practice." *Volbers-Klarich v. Middletown Mgmt.*, 929 N.E.2d 434, 441 (Ohio 2010). Additionally, plaintiffs must identify the rule or case that satisfies section 1345.09(B)'s notice requirement in their complaint, *In Re Porsche Cars N. Am.*, 880 F. Supp. 2d at 868; *Johnson v. Microsoft Corp.*, 802 N.E.2d 712, 720 (Ohio

Ct. App. 2003), and federal district court cases cannot provide the requisite notice, *Kline v. Mortg. Elec. Sec. Sys.*, 2010 U.S. Dist. LEXIS 143391, at *18-19 (S.D. Ohio Dec. 30, 2010). If plaintiffs fail to identify a rule or case that satisfies Section 1345.09(B), dismissal of the class claim must follow, and the plaintiffs may only proceed as individuals. *See Volbers-Klarich*, 929 N.E.2d at 441.

The Complaint fails to identify any rule adopted by the Ohio attorney general regarding post-warranty engine timing chain defects, or any case which has previously held that failing to disclose such an alleged defect constitutes an OCSPA violation. Thus, Plaintiff Scott's class claim must be dismissed.

K. Certain of Plaintiffs' Consumer Protection Claims are Time Barred (Counts XIII, XXVIII and XXX)

Actions brought under the Connecticut Unfair Trade Practices Act and Section 349 of New York's General Business Law must be brought within 3 years after the occurrence of a violation, and there is no discovery rule. Conn. Gen. Stat. § 42-110g; *LaChance v. Day*, 2012 Conn. Super. LEXIS 593, at *5-6 (Conn. Super. Ct. 2012); *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1184-85 (N.Y. 2013); *Lucker v. Bay Cemetery*, 979 N.Y.S.2d 8, 18 (N.Y. App. Div. 2013); *Medical Herald Publishing Co., Inc., v. J.P. Morgan Chase Bank, N.A.*, 2014 U.S. Dist. LEXIS 169127, at **11-12 (S.D.N.Y. Nov. 25, 2014). As Plaintiffs Molwitz, Gaudet and Serbia bought their vehicles in 2009 and 2011 (*See* Compl. ¶¶ 56, 59 & Cameron Decl. dated Dec. 5, 2016, Ex. I), and Plaintiff Melman purchased his vehicle on November 18, 2009 (Compl. ¶ 24), the statutes of limitations has expired and their consumer fraud claims are time barred.

Further, as to Plaintiff Scott, the statute of limitations for an OCSPA claim is two years from the time of sale, and there is no discovery rule. Ohio Rev. Code Ann. §1345.10(c); *see Allen v. Andersen Windows, Inc.*, 913 F. Supp. 2d 490, 506 (S.D. Ohio 2012); *Savett v. Whirlpool Corp.*, 2012 U.S. Dist. LEXIS 124086, at *7-8 (N.D. Ohio Aug. 31, 2012). VWGoA's records show that Scott purchased his 2011 VW GTI on April 28, 2011 (*see* Cameron Decl. dated Dec. 5, 2016, Ex. J). Thus, his claim is time-barred.

CONCLUSION

WHEREFORE, VWGoA respectfully requests that the Court enter an order (1) dismissing Plaintiffs' Fraud (Count I), Negligent Misrepresentation (Count III) and Consumer Fraud (Counts VIII-XXXIV) claims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1); (2) directing plaintiffs Hosier, Swihart, Piumarta, Nadiri, Kane, Zielezinksi, Ellahie, Blanchard and Smith to arbitrate their remaining claims; and (3) dismissing with prejudice all remaining claims pursuant to Rules 8(a) and 12(b)(6) for failure to satisfy the requisite pleading standards and to state a claim upon which relief can be granted, **OR**, in the event the Court concludes it has jurisdiction over Counts I, III and VIII-XXXIV, an Order (1) directing plaintiffs Hosier, Swihart, Piumarta, Nadiri, Kane, Zielezinksi, Ellahie, Blanchard and Smith to arbitrate their claims; and (2) dismissing with prejudice all remaining claims pursuant to Rules 8(a), 9(b) and 12(b)(6) for failure to satisfy the requisite pleading standards and to state a claim upon which relief can be granted. For the convenience of the Court, a summary of the grounds for dismissal of each claim is attached as Appendix "A."

Dated: December 12, 2016

Respectfully submitted,

CHASE, KURSHAN, HERZFELD
& RUBIN, LLC
By: */s/ Jeffrey L. Chase*
Jeffrey L. Chase, Esq. (JC4476)
354 Eisenhower Parkway
Suite 1100
Livingston, New Jersey 07039
Telephone: (973) 535-8840
Attorneys for Defendant
Volkswagen Group of America, Inc.